Office - Supreme Court, U.S.
FILED
JAN 24 1983
ALEXANDER L. STEVAS,
CLERK

No 82-1242

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IN RE

KEENE CORPORATION, GAF CORPORATION, AND PACOR, INC.,

Petitioners.

MOTION TO ADVANCE CONSIDERATION AND ARGUMENT

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Petitioners, by their counsel, respectfully submit that the questions of national importance involved in this case warrant expeditious consideration by this Court. Petitioners, therefore, move for an order reducing from thirty (30) days to fifteen (15) days the time within which parties may respond to the Petition for Writs of Prohibition and Mandamus (the "Petition") and expediting any oral argument with respect thereto.

Keene Corporation,[1] GAF Corporation[2] and Pacor, Inc.[3] have, simultaneously with the filing of this motion, petitioned this Court for Writs of Prohibition and Mandamus to the United States District Court for the Southern District of New York (the "District Court") and the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").

The Petition seeks to prevent the unlawful exercise of bankruptcy jurisdiction by the District Court and the Bankruptcy Court. The Petition is based on the ground that the decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982) ("Marathon"), invalidated the entire jurisdictional grant of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (1978) (the "Reform Act"), and thereby divested

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1. Keene Corporation, petitioner and movant herein, states that this is its second Designation of Corporate Relationships. The Designation that was filed originally remains accurate.

2. GAF Corporation, petitioner and movant herein, states that this is its second Designation of Corporate Relationships. The Designation that was filed originally remains accurate.

3. Pacor, Inc., petitioner and movant herein, states that this is its second Designation of Corporate Relationship. The Designation that was filed originally remains accurate.

the bankruptcy courts and the district courts of the United States of all jurisdiction over cases under, arising in or related to cases under Title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. Petitioners further seek a declaration of this Court that the district courts of the United States lack the power to adopt an emergency rule which delegates to the bankruptcy courts the very authority declared to be unconstitutional in Marathon.

Petitioners request relief: (a) in respect of the order of the Bankruptcy Court on January 10, 1983, in an adversary proceeding brought by, inter alia, petitioners Keene Corporation and GAF Corporation in the reorganization cases of Johns-Manville Corporation, et al. (collectively, "Manville"),[4] which denied petitioners' request to lift the automatic stay of 11 U.S.C. § 362 to permit the continued prosecution of thousands of asbestos-related personal injury and property damage cases against Manville (the "Asbestos Cases"); and (b) in respect of the order entered by the District Court on December 21, 1982, which certified the adoption of Emergency Rule I, pursuant to which petitioners Keene Corporation and Pacor, Inc. have been enjoined from taking any action designed to restore Manville as a party to the Asbestos Cases by a Temporary Restraining Order and a Consent Order both issued by the Bankruptcy Court, on January 6, 1983 and January 14, 1983, respectively.[5]

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4. In re Johns-Manville Corp. (GAF Corp v. Johns-Manville Corp., Adv. No. 82-6221A) Reorganization Nos. 82-B-11656 through 82-B-11676, inclusive (Bankr. S.D.N.Y. Jan. 10, 1983). A copy of the Bankruptcy Court's Decision and Order appears in the Appendix at A-20.

5. Copies of the District Court's order of December 21, 1982 and Emergency Rule I, as modified, appear in the Appendix at A-1 through A-12. Copies of the Bankruptcy Court's orders of January 6, 1983 and January 14, 1983 appear in the Appendix at A-13 and A-84, respectively.

I. THE DISTRICT COURT AND BANKRUPTCY COURT ARE IMPROPERLY EXERCISING JURISDICTION OVER BANKRUPTCY MATTERS IN VIOLATION OF PETITIONERS' CONSTITUTIONAL RIGHTS

In Marathon, this Court held that Congress's grant of jurisdiction to the bankruptcy judges in the Reform Act violated Article III of the United States Constitution. 102 S. Ct. at 2880. A majority of the Court further held that the impermissible jurisdictional grant to the bankruptcy judges was not severable from the remaining grant of jurisdiction under Section 241(a) of the Reform Act. Id. at 2880 & n.40; id. at 2882 (Rehnquist, J., concurring).

Accordingly, Marathon invalidated the Reform Act's entire grant of bankruptcy jurisdiction, both to the district courts and the bankruptcy courts. Thus, no court has the power to enforce the automatic stay provisions of 11 U.S.C. §362.

This Court twice stayed the effect of Marathon in order to permit Congress to discharge its responsibility of enacting appropriate remedial legislation. Congress failed to act before the expiration of the stay and the Marathon decision became effective on December 25, 1982.

In an attempt to remedy the problems caused by Congress's inaction, the District Court has adopted Emergency Rule I, thereby usurping legislative powers which are exclusively reserved for Congress:

> We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Article III, in the way that will best effectuate the legislative purpose.

102 S. Ct. at 2880, n.40. Therefore, Emergency Rule I is inherently unconstitutional.

In sum, the jurisdiction which the Bankruptcy Court and the District Court purportedly exercise over Manville and petitioners on a daily basis violates petitioners' constitutional rights.

II. THE COMPELLING CIRCUMSTANCES OF THIS CASE WARRANT ITS EXPEDITIOUS RESOLUTION BY THIS COURT

While petitioners seek specific relief, thousands of debtors and claimants throughout the country are similarly affected by unconstitutional actions of district courts and bankruptcy judges, since a majority of federal district courts have adopted emergency rules equivalent to Emergency Rule I.

Subsequent to the expiration of this Court's stay of Marathon, lower courts which have interpreted the powers of bankruptcy courts have reached inconsistent conclusions.[6]

This Court has expedited its consideration of cases involving compelling circumstances and matters of general importance.[7]

It is respectfully submitted that the questions presented by Petitioners in this case are inevitably bound

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6. Certain of these contradictory decisions are discussed in the Petition and appear in the Appendix at A-119, A-153, and A-160.

7. See Alexander v. Holmes County Board of Education, 396 U.S. 19, order advancing briefing and argument, 396 U.S. 802 (1969) (involving the rights of thousands of children attending segregated schools in Mississippi); Williams v. Rhodes, 393 U.S. 23, order to advance, 89 S. Ct. 1 (1968); United Steelworkers of America v. United States, 361 U.S. 878 (1959); Shub v. Simpson, 340 U.S. 861 (1950) (political election law disputes). See also Lurk v. United States, 366 U.S. 712 (1961) (Frankfurter, J., dissenting).

for resolution by this Court, and an expeditious resolution is necessary to avoid irreparable harm to hundreds of thousands of litigants presently before bankruptcy courts throughout the nation.[8]

WHEREFORE, Petitioners respectfully request an order (1) advancing the time in which Respondents may respond to the Petition for Writs of Prohibition and Mandamus, from thirty (30) days to fifteen (15) days; and (2) advancing the time for any oral argument which the Court may order in this case.

Dated: January 24, 1983

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8. The confusion in the lower courts recently has been addressed specifically by two lower courts. In Smith v. Johns-Manville Sales Corp., Nos. 80-4680, 80-11156 (Fla. Cir. Ct. Dade Co. Jan. 17, 1983), one of the thousands of Asbestos Cases related to Manville's bankruptcy case, the court queried whether the parties had sought a writ of prohibition directed to the Bankruptcy Court. (Appendix at A-160, A-175). In Johns-Manville Corp. v. The Home Insurance Co., Adv. No. 3-82-1730-JR (Bankr. N.D. Cal. Jan. 21, 1983), petitioners are advised that a bankruptcy court has remanded a related proceeding to the state court precisely because of the jurisdictional problems set forth in the Petition.

82-1242

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CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

In re KEENE CORPORATION, GAF CORPORATION AND PACOR, INC.,

Petitioners.

APPENDIX TO PETITION FOR WRITS OF PROHIBITION AND MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - -x

In the Matter :

of : ORDER

EMERGENCY BANKRUPTCY :
RULE I
- - - - - - - - - - - - - - - -x

The undersigned hereby certifies that, at a duly constituted meeting of the Board of Judges, held on December 15, 1982, the attached Emergency Bankruptcy Rule I for the United States District Court for the Southern District of New York was adopted.

Dated: New York, New York
December 21, 1982

s/ Constance Baker Motley
CONSTANCE BAKER MOTLEY
Chief Judge

R U L E

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district courts' assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The bankruptcy court constituted by §404 of Public Law 95-598 shall continue to be known as the United States

Bankruptcy Court of this district. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district without approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy judges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt --

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, un-

less stayed by the bankruptcy judge or a district judge.

(3) (A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estate; allowance of and objection to claims against the estate; counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatice stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgment or order to the district judge, unless the parties to the

proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment or proposed order or judgment of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgment or order. As modified by sections (e) 2A and B of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge of time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the bankruptcy judge certifies that

circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal or application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge of any matter subject to review under paragraph (d)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding

prior to the time of the entry of the order of judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended and by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the Act, to the extent that such Title and Rules are not inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ____, 102 S. Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982 in the absence of congressional action or extension of the stay and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982 shall be deemed referred to that judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - -x

In the Matter of the Supplement : ORDER
to :
EMERGENCY BANKRUPTCY RULE I :
- - - - - - - - - - - - - - -x

By vote of the Southern District Board of Judges on January 12, 1983, Emergency Bankruptcy Rule I of this court is hereby supplemented to include the following:

(a) Purpose of Rules: The purpose of these rules is to supplement the provisions of Emergency Bankruptcy Rule I promulgated by the district court and to provide the necessary mechanisms to implement that Rule.

(b) Designation on Papers: Counsel should include in the caption of all papers (except proofs of claim) filed in the bankruptcy court a statement whether the matter is a related proceeding within the meaning of Emergency Bankruptcy Rule I(d)(3)(A).

(c) Consent to Entry of Judgment or Order: In a related proceeding within the meaning of Emergency Bankruptcy Rule I(d)(3)(A), consent to the entry of judgment or a dispositive order by the bankruptcy judge, in lieu of entry by a district judge, which consent is authorized by (d)(3)(B) of Emergency Bankruptcy Rule I, may be evidenced by coun-

sel's signature or the signature of a party not represented by counsel on the proposed order or judgment or by a separate stipulation or may be made in open court on the record. Any party submitting a proposed dispositive order or judgment shall certify whether consent to the bankruptcy judge's entry in lieu of entry by a district judge has been obtained from all necessary parties.

(d) Findings, Conclusions, and Proposed Orders and Judgments: In a related proceeding within the meaning of Emergency Bankruptcy Rule I(d)(3)(A), in the absence of consent, the bankruptcy judge shall file findings, conclusions, and a proposed dispositive order or judgment with the Clerk of the Bankruptcy Court. A copy shall forthwith be mailed by the Clerk of the Bankruptcy Court to all parties who shall have ten (10) days from the date of mailing within which to serve written objections to such conclusions, findings, and proposed dispositive order or judgment on the opposing parties and to file the objections with the Clerk of the Bankruptcy Court who shall send the objections to the Clerk of the District Court for transmittal to the assigned district judge.

(e) Dispute Whether Matter is Related Proceeding: The Court on its own motion or any party by motion may seek a determination of whether a matter is a related proceeding within the meaning of Emergency Bankruptcy Rule I(d)(3)(A). The motion shall be brought on before the bankruptcy judge on not less than two (2) days written notice to all parties. The bankruptcy judge's

determination whether the matter is a related proceeding shall be in the form of an order to that effect. If there are circumstances that require the order to be approved by a district judge, the bankruptcy court shall so certify to the district court pursuant to Emergency Bankruptcy Rule I.

(f) Suggestion of Circumstances that Require Order or Judgment to be approved by a District Judge: Any party believing that circumstances require that any order or judgment (other than a dispositive order or judgment entered on consent in a related proceeding) be approved by the district court shall file written application with the bankruptcy court prior to the time of signing of any such order or judgment, or if a hearing is held, prior to the conclusion of the hearing, stating the circumstances believed to require such approval and requesting that the bankruptcy court so certify. The certification may be included in the proposed order; in the case of a judgment, the suggested certification shall be in a separate proposed order. The bankruptcy court need not hold a hearing on the question of certification.

(g) Presumed Consent to Jurisdiction of Bankruptcy Court: A failure to file written application authorized by Rule (f) of these rules shall be deemed a consent to the jurisdiction of the bankruptcy court to make such order or judgment without reference to the district court to the extent that such consent might lawfully have been given.

The supplement is effective as of the date of entry of this order

s/Constance Baker Motley
CONSTANCE BAKER MOTLEY
Chief Judge

Dated: New York, New York
January 14, 1983

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re JOHNS-MANVILLE CORPORATION, et al.,	In Proceedings for a Reorganization under
Debtors,	Chapter 11
JOHNS-MANVILLE CORPORATION, et al.,	Case Nos. 82B11656 through 82B11676
Movants,	
-against-	ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINING ORDER
KEENE CORPORATION, PACOR, INC., LaBRUM & DOAK and RAWLE & HENDERSON,	
Respondents.	

Upon the annexed application of Movants Johns-Manville Corporation, et al. (collectively "Manville"), [Emergency Bankruptcy Rule I, Rule (d)(3)(A) of the United States District Court of the Southern District of New York]*, and the exhibits attached thereto and the

* s/ BRL

annexed affidavit of Miriam G. Cedarbaum filed herewith by Manville seeking a temporary restraining order against the Respondents pursuant to Sections 362 and 105 of the Bankruptcy Code and Rule 765 of the Rules of Bankruptcy Procedure and

IT APPEARING that Keene Corporation, Pacor, Inc., LaBrum & Doak and Rawle & Henderson, are improperly continuing a judicial proceeding against Manville that was commenced before the filing by Manville of petitions for reorganization under Chapter 11, §301 of the Bankruptcy Reform Act of 1978, as amended (the "Code") on August 26, 1982,

NOW, on motion of DAVIS POLK & WARDWELL and LEVIN & WEINTRAUB & CRAMES, attorneys for Manville, it is

ORDERED, that Keene Corporation and Pacor, Inc. and their attorneys LaBrum & Doak and Rawle & Henderson

individually (collectively the "Respondents"), show cause before the Honorable Burton R. Lifland, United States Bankruptcy Judge, at the United States Courthouse, Room 237, Foley Square, New York, New York on the 14th day of January, 1983 at 10 in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made and entered:

(a) Decreeing and adjudging Respondents to have violated and to be in continuing violation of the Automatic Stay provision of Section 362 of the Code and this Court's Restraining Order, entered August 26, 1982;

(b) Decreeing and adjudging Respondents to be in civil contempt of this Court and imposing a fine by reason of their

violation and continuing violation of the Automatic Stay provision of Section 362 of the Code and this Court's Restraining Order entered August 26, 1982;

(c) Until upon application to and order of this Court, permanently restraining, staying and enjoining Respondents from taking any action in support of their motion to vacate the severance of Manville in the case of Morocco v. Johns-Manville Corp., September Term 1978, No. 88 (123) 53 currently pending in the Court of Common Pleas of Philadelphia County, and permanently restraining, staying and enjoining Respondents from taking

any other action in violation or derogation of Section 362 of the Code and this Court's Restraining Order entered August 26, 1982 and from taking any other action that would in any respect alter the status of Manville as of December 24, 1982 in the Morocco case or any other asbestos related case;

(d) Directing Respondents individually and collectively to withdraw their motion to vacate the severance of Manville filed December 30, 1982 in the Court of Common Pleas of Philadelphia County;

(e) Granting Manville such other and further relief as is just and proper;

and it is further

ORDERED, that pending the hearing and determination of this matter, the Defendants individually and collectively are temporarily restrained from taking any action in support of their motion to vacate the severance of Manville in the case of Morocco v. Johns-Manville Corp., et al., September Term 1978, No. 88 (123)53 currently pending in the Court of Common Pleas of Philadelphia County, and taking any other action in violation or derogation of Section 362 of the Bankruptcy Code and this Court Restraining Order entered August 26, 1982 and taking any other action that would alter in any respect the status of Manville in the Morocco case or any other asbestos related case as of December 24, 1982; and it is further

ORDERED, that telephonic notice of the terms of this order by January 6, 1983 to and service by hand delivery upon LaBrum & Doak and Rawle & Henderson by the close of business on January 6, 1983 shall be deemed good and sufficient service and notice of the relief requested herein.

Dated: New York, New York
January 6, 1983
4:45 P.M.

s/ Burton R. Lifland
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - -x

In the Matter

of

JOHNS-MANVILLE CORPORATION, et al.

Debtor.

- - - - - - - - - - - - - - -x

82 B 11656

through

82 B 11076

GAF CORPORATION, KEENE CORPORATION, ARMSTRONG WORLD INDUSTRIES, INC., H.K. PORTER COMPANY, INC., PITTSBURGH CORNING CORPORATION, GARLOCK, INC., EAGLE-PICHER INDUSTRIES, INC., THE CELOTEX CORPORATION and FIBERBOARD CORPORATION, on behalf of themselves and the unofficial committee of Asbestos Case Co-Defendants,

Plaintiffs,

vs.

JOHNS-MANVILLE CORP., et al.,

Defendants.

- - - - - - - - - - - - - - -x

(82-6221A)

DECISION NO. 1 AND ORDER IN RELATED AUTOMATIC STAY PROCEEDINGS

APPEARANCES:

Levin & Weintraub, Esqs.,
Attorneys for Debtors,
225 Broadway
New York, New York

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BEFORE: HON. BURTON R. LIFLAND,
U.S. BANKRUPTCY JUDGE

DECISION ON MOTION FOR SUMMARY JUDGMENT FOR DECLARATORY RELIEF TO EXTEND THE AUTOMATIC STAY TO ENCOMPASS CO-DEFENDANTS

I. Background Facts

Plaintiffs in this declaratory judgment action are inviting this Court pursuant to its equitable powers to broaden the automatic stay afforded the debtor under 11 U.S.C. 362 to include the non-debtor plaintiffs. Essentially, these plaintiffs request by motion for summary judgment that this Court make a ruling which would be the ultimate determination for all courts across the country as to the indispensable nature of Manville in asbestos litigation pending in various state and federal forums.

The plaintiffs are co-defendants of Johns-Manville, Inc. ("Manville") in approximately 11,000 asbestos-related personal injury and property damage

suits to which Manville or any of its affiliates is a party. Plaintiffs herein are GAF Corporation, Keene Corporation, Armstrong World Industries, Inc., H.K. Porter Company, Inc., Pittsburgh Corning Corporation, Garlock, Inc., Eagle-Picher Industries, Inc., The Celotex Corporation and Fiberboard Corporation ("the co-defendants").

Manville is a diversified manufacturing, mining and forest products company conducting its business through five principal operating subsidiaries. It is the world's largest miner, processor, and supplier of asbestos and asbestos-containing products. Manville's Chapter 11 filing is unprecedented in that it purports to be a healthy company with a substantial net worth. It contends that its financial difficulties have arisen from its position as defen-

dant or co-defendant in the asbestos litigation brought by more than 15,550 plaintiffs throughout the country. Suits are currently pending in 46 states. Some court systems have more than 2,000 asbestos lawsuits. An average of 425 new asbestos lawsuits per month were brought against Manville pre-petition and it estimates that approximately 32,000 additional suits could be brought against it in the next 27 years.

According to Manville, its current cost for these suits is estimated at approximately $40,000 per case, excluding cases on appeal. Manville has disclosed that since 1981, it has been found liable for punitive damages in several asbestos lawsuits and anticipates additional exemplary damages awards which greatly increase its poten-

tial liabilities. According to a study commissioned by Manville, its potential liability in the asbestos litigation will be not less than $2 billion over the next 20 years.

In addition to its litigation with the plaintiffs, Manville is engaged in litigation with its insurance carriers regarding its coverage for the claims asserted against it in the asbestos litigation. See Johns-Manville Corporation v. The Home Insurance Co., No. 765226 (Cal. Sup. Ct., San Francisco County). Manville's insurance carriers have thus far largely disclaimed coverage and refuse to defend or indemnify Manville from its liability in these suits. At issue in the insurance litigation is coverage in excess of $600 million.

II. Facts Regarding the Instant Proceeding

On August 26, 1982, Manville filed a petition within the framework of Chapter 11 of the Bankruptcy Code (the "Code"). Pursuant to Section 362(a) of the Code, the filing of the petition triggered an automatic stay of the commencement or continuation of all proceedings against Manville that had been or could have been commenced prior to the bringing of Manville's Chapter 11 petition. on the same date, this Court entered a restraining order substantially identical to the Section 362 stay.

Seeking to broaden the Manville stay so as to include them, the co-defendants assert that such an order is vital for the orderly liquidation of claims against Manville. They point out that courts throughout the country have

reached inconsistent results with respect to the effects of the stay on co-defendants. They further contend that they have unliquidated and contingent claims against Manville for contribution or indemnification relating to the asbestos cases. They argue that a stay order applicable to them is necessary to facilitate the equitable administration of the Manville estate and to allow all parties to concentrate on a plan of reorganization rather than to apply their resources to duplicative and protracted litigation. They submit that this Chapter 11 case is so extraordinary and the debtors' involvement in the subject litigation is so inextricably bound up with the rights and responsibilities of the co-defendants and the class they represent that this Court must exercise its power pursuant to Section 105 of the

code in the interest of facilitating a comprehensive plan of reorganization which will resolve on a global basis this mammoth problem.

In the alternative, the co-defendants seek an order pursuant to Section 362(a) modifying the automatic stay so as to allow the asbestos cases throughout the country to proceed to the point of judgment, staying only the collection or enforcement of any resulting judgment.

The co-defendants argue that this relief would facilitate the resolution and liquidation of claims, relieve this Court of the burden of trying the many asbestos cases now pending throughout the country[1], allow equitable treatment of all Manville's creditors and avoid duplicative litigation.

The Asbestos Committee, appointed pursuant to an order of this Court and acting as a fiduciary for, inter alia, claimants who have commenced suits for asbestos-related injuries against Manville, has been permitted to intervene as a defendant. Opposing the request to expand the stay to include the co-defendants, the Asbestos Committee also cross-claims seeking to lift the present Section 362 stay so as to allow the suits against Manville to proceed to judgment.

III. Issues Presented

The issues presented are: (1) whether this Court should take the unprecedented step of exercising its discretion pursuant to Section 105 of the Code to extend the Section 362 automatic stay so as to encompass the co-defendants herein; and (2) whether, in the alternative,

the automatic stay may be lifted to allow all actions against Manville to proceed to judgment.

IV. Discussion of Law

Upon examination of the actual wording and legislative history of Sections 362 and 105 and the relevant case law, it is the determination of this court not to extend Manville's Section 362 automatic stay on a global basis so as to prohibit the pursuance of all claims against all co-defendants in every case now pending throughout the country. Rather, the determination of this issue must remain lodged with the court before whom each individual case is pending.

The co-defendants have argued at various times during these proceedings that this court consider their plea that a universal stay will have the effect of

creating an atmosphere within the Manville reorganization that could accommodate an industry-wide solution of the entire asbestos health-related problem. They hypothesize a suspension of the enormous litigation nationwide which would facilitate the creation of a superfund or pool to which they, the insurance industry and Manville would contribute; and a delivery system to the health claimants. To the extent that the co-defendants purported goal is to join in the creation of an expedient, efficient and fair compensatory delivery system to asbestos victims, their aim is indeed laudable, notwithstanding their self-advancing motivations. The co-defendants assert that extending the stay will shift the focus from asbestos lawsuits and render the asbestos claimants more amenable to cooperate with the

debtors and others, including the insurance industry, to achieve a successful reorganization that could include present claimants, as well as future victims who have not as yet manifested symptoms of asbestos-related disease. Indeed, this suspension of the litigation might well serve the purposes urged by the co-defendants.

However, such a pervasive stay, while tempting, is not within this Court's power at this juncture because, as fully discussed infra, the scope of Section 362 is narrowly focused on protection of the Debtor only. Such a pervasive extension of the stay may not be accomplished by judicial fiat. Thus, I am constrained to declare that so broad an extension of the automatic stay must either be accomplished by legisla-

tion or conceivably as part of an eventual reorganization plan.

Moreover, insufficient cause has been shown by the co-defendants to justify lifting the stay to allow all suits to proceed against Manville to judgment.

A. The Main Relief Sought

1. The Scope of Section 362 of the Bankruptcy Code

Section 362 of the code provides in part:

> (a) Except as provided in subsection (b) of this section, a petition filed under Section 301, 302, or 303 of this title operates as a stay, applicable to all entities of (1) The commencement or continuation, including issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

11 U.S.C. §362(a)(1979).

The language of Section 362 clearly refers only to actions against the debtor and does not relate to any other interparty claims. See Royal Truck & Trailer v. Armadora Maritime Salvadoreana, 10 B.R. 488, 490 (N.D. Ill. 1981); In re Related Asbestos Cases, 23 B.R. 523, 9 B.C.D. 874 (N.D. Cal. 1982). A literal interpretation of this language comports with the rationale behind the formulation of an automatic stay in this statutory scheme as described in Paden v. Union for Experimenting Colleges and Universities, 7 B.R. 289 (N.D. Ill. 1980). In Paden, the Court stated that the automatic stay is designed:

> to prevent the dissipation or dimunition of the bankrupt's assets during the pendency of the Chapter XI proceeding... and to avoid the multiplicity of claims in different forums against the estate. Id. at 290 (describing the reasons for the predecessor to Section 362, Rules of Bankruptcy pro-

cedure 11-44 applied to the 1898 Bankruptcy Act).

Furthermore, the legislative history of Section 362 indicates that the automatic stay protects creditors from the injustice of a race for debtor's assets:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

See H.R. Rep. No. 95-595, 95th Cong., 2nd Sess. 340 (1978) (emphasis added).

The legislative history also notes that Section 362 is designed to protect the debtor:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harrassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

See S.Rep. No. 95-989, 95th Cong., 2d Sess. 54-55 (1978).

Notwithstanding this limited focus of Section 362, the co-defendants urge the Court to use its discretionary powers to include them under the penumbra of Section 362's protection. However, although I find their arguments attractive, I do not find their request for such an extension of the automatic stay supportable at law. This holding is formulated against a background of authority denying such relief in bankruptcy cases generally as well as in other

courts' decisions in the Manville and United Asbestos and Rubber Co. ("Unarco")[2] bankruptcy cases.

In the oft-cited Royal Truck case, 10 B.R. 488 (N.D. Ill. 1981), a suit pending against the debtor for breach of lease was stayed when the debtor filed a Chapter 11 petition. In that suit, a co-defendant, who was the guarantor of a lease of equipment to the debtor, had also been sued by plaintiff and had, in turn, filed a counterclaim against the debtor for indemnification. The plaintiff in that litigation, Royal Truck and Trailer, Inc., requested leave of the bankruptcy court to proceed against the co-defendant. The court granted plaintiff's motion and allowed the suits against the co-defendant to continue. However, in so doing, the Court in Royal Truck expressly left the door open for

this kind of suit in the future and acknowledged that there are instances where a bankruptcy court may properly stay proceedings against non-bankrupt co-defendants. The Court declared: "Something more than the mere fact that one of the parties to the lawsuits has filed a Chapter 11 bankruptcy petition must be shown in order that proceedings be stayed against non-bankrupt parties." Id. at 491.

The co-defendant guarantor in Royal Truck had alleged that the debtor's petition operated to stay all proceedings against it. The court rejected this contention because the legislative history of the statute, the well-settled interpretation of the predecessor Act by cases and commentary and the clear language of Section 362 "makes it quite clear that, in Chapter 11, the protec-

tions afforded the bankrupt are designed for the debtor-bankrupt only." Id. at 490. The court in Royal Truck thereby concluded that no convincing justification for extending the stay had been demonstrated in that particular case and therefore maintained the status quo.

The court then examined whether the debtor in Royal Truck was an indispensable party under Rule 19 of the Federal Rules of Civil Procedure ("FRCP") in whose absence the plaintiff's suit could not proceed. In so doing, the court considered the four interests suggested by Rule 19(b) to be weighed in making its determination whether in equity and good conscience the action should proceed among the parties before it. These interests were: (1) plaintiff's interest in having a forum against co-defendants; (2) the co-defendants' interest

in avoiding multiple litigation, inconsistent relief or sole responsibility for a liability it shares with another; (3) the debtor's interest in being adequately represented during the proceedings against the co-defendants; (4) the court and public's interest in complete, consistent and efficient settlement of controversies. Id. at 492. (citing Provident Tradesman Bank v. Patterson, 390 U.S. 102, 109-10 (1968)).

The only interest which militated against proceeding with the case against co-defendants in Royal Truck was the risk of incurring multiple or inconsistent obligations. However, since the co-debtor in Royal Truck was a joint obligor and thus primarily liable, it could have been sued as the only defendant. Thus, the co-defendants' request to be able to pursue their claim against

the debtors in one proceeding was deemed by the court to be desirable, although not essential to a resolution of the action.

The court in Royal Truck recognized plaintiff's interest in having a forum, and noted that plaintiff did not necessarily have an alternative forum available to press its claims against the co-debtor. Therefore, the court granted plaintiff's motion to proceed against the co-debtor because it did not perceive a great risk of inconsistent judgments nor an adverse effect upon the debtor by proceeding without it.

The court went on to compare the specificity with which Chapter 13 of the Code was drafted relative to that of Chapter 11. Chapter 13, in contrast to Chapter 11, specifically allows for the stay of an action against a co-debtor:

> Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless (1) such individual became liable on or secured such debt in the ordinary course of such individual's business....11 U.S.C. §1301(a).

This implication is clear: Unless specifically called for in the Code, the automatic stay applies only to the debtor.

Other cases are in accord with the result in Royal Truck. In In re Aboussie Brothers Construction Co., 8 B.R. 302 (E.D. Mo. 1981), a partnership filed a Chapter 11 petition. The district court affirmed the bankruptcy court's refusal to enjoin the plaintiff from continuing its state court action

against the individual partners of the debtor partnership. The adverse effect on the debtor of impairment of the partner's ability to contribute funds to the reorganization was deemed insufficient justification for the issuance of the injunction.

Similarly, in General Motors Acceptance Corp. v. Yates Motor Co., 159 Ga. App. 215, 283 S.E.2d 74 (1981), plaintiff Yates Motor Co. transferred title and possession of three trucks to the debtor in return for a check in the amount of $19,860.19. The debtor's check was dishonored due to insufficient funds. The debtor subsequently transferred the trucks to General Motors Acceptance Corp. ("GMAC"). On January 16, 1980, Yates filed a complaint in Georgia state court against, inter alia, the debtor and GMAC alleging conversion.

On January 21, 1980, the debtor filed a petition in bankruptcy. On October 15, 1980 a default judgment was entered against GMAC.

On appeal, GMAC contended that the trial court erred in entering the default as the proceedings were stayed against it as a co-defendant of the debtor. The court refused to extend the scope of the stay because the allegations against the debtor and GMAC were not so "inextricably interwoven" that the Section 362 stay applied to GMAC merely because it was a co-defendant of the debtor. See also In re Casgul, 22 B.R. 65 (B.A.P. 9th Cir. 1982) (automatic stay applies only for the benefit of the debtor and relief from it cannot be conditioned on forebearance from proceeding against officers or directors of the debtor corporation); In re The

Bank Center Ltd., 15 B.R. 64 (Bankr. D. Conn. 1981) (action permitted against general partners of bankrupt partnership to confirm adverse judgment on arbitration award); In re Larmar Estates, Inc., 5 B.R. 328 (Bankr. E.D.N.Y. 1980) (suit against guarantors of a loan who were also co-defendants of the debtor is not stayed); In re Cloud Nine, 3 B.R. 202 (Bankr. D.N. Mex. 1980) (creditors permitted to continue state court action against co-debtors).

Courts across the country have been faced with the dilemma of whether to proceed in asbestos litigation in the absence of a co-defendant which has filed for Chapter 11. These courts have reached differing conclusions depending upon the individual facts in each case. Some courts have allowed the actions to continue against co-defendants in the

absence of Manville or Unarco. See, e.g., In re Massachusetts Asbestos Cases M.B.L. Nos. 1&2 (D. Mass. Sept. 28, 1982) (the legislative history of section 362 and the case law decided thereunder makes it abundantly clear that the automatic stay operates only against the debtor seeking protection) and In re Related Asbestos Cases, 23 B.R. 523, 9 B.C.D. 874 (N.D. Cal. 1982), where the court held that Section 362 does not apply to claims against non-bankrupt co-defendants. In this California case, Chief Judge Peckham ordered the severance of the claims against Manville and Unarco and allowed the cases against the co-defendants to continue. He held that FRCP Rule 19 is no impediment to the continuation of these suits because joint tortfeasors are not indispensable parties. See also Lynch v. Johns-Man-

ville Sales Corp., 7 C.B.C. 2d 342 (S.D. Ohio 1982) (Section 362(a) does not stay litigation against solvent co-defendants of a Chapter 11 debtor and Unarco and Johns-Manville are neither necessary nor indispensable parties as defined in Rule 19 FRCP because the co-defendants' interest in avoiding multiple litigation did not outweigh plaintiff's interest in having a forum); In re Asbestos Related Cases No. B1-CP-1 (E.D.N.C. September 13, 1982) (The bankruptcy filings of Unarco and Johns-Manville do not automatically stay the suits as to the remaining co-defendants); Kindle v. Fiberboard Corporation, No. TY 79-35-CA (E.D. Tex. August 12, 1982), petition for writ of mandamus denied, No. 82-2339 (5th Cir. Aug. 20, 1982).

The courts in the above-cited cases have followed the rationale of Royal

Truck and have relied on the plain language of Section 362(a) which acts as a stay of actions against the debtor only. These courts also note that the legislative history supports this construction and rely on the comparison between the specific statutory provision for extension of the stay to co-debtors in Chapter 13 and the absence of any counterpart to it in Chapter 11. See, e.g., Kindle, supra; In re Related Asbestos Cases, supra.[3]

Co-defendants cite two cases to bolster their position that the Section 362(a) stay operates to stay actions against all parties where a co-defendant has filed a bankruptcy petition. These two cases, however, are as inapposite as the asbestos cases cited above. First, co-defendants cite Federal Life Insurance Co. (Mutual) v. First Financial

Group of Texas, Inc., 3 B.R. 375 (S.D. Texas 1980). In Federal Life, the district judge refused to permit a plaintiff to sever its claim against a corporate debtor and proceed against the individual co-defendants, one of whom was a corporate officer of the debtor. The court appears to have rested its decision on its broad discretionary powers under FRCP 42(b) to permit or deny severance of actions in light of considerations of justice and efficiency.

It is significant that the ruling in Federal Life was made by a trial judge in a non-bankruptcy forum whose decision was based upon the particular facts before him rather than upon general principles. The court in Federal Life found that the allegations against the debtor and its officers were "inex-

tricably interwoven, presenting common questions of law and fact, which can be resolved in one proceeding," id. at 376, and "arise from the same factual and legal basis." id. at 377. In contrast, in the instant case no such inextricable intertwining has been proven as to each and every individual case by the co-defendants. This is because the only relationship demonstrated between the co-defendants is that of joint tortfeasors. Each co-defendant is an entirely independent entity, quite unlike each officer of a debtor corporation.[4]

The co-defendants also rely on In re White Motor Credit Corp., 11 B.R. 294 (Bankr. N.D. Ohio 1981), rev'd on other grounds, 23 B.R. 276 (N.D. Ohio 1982), in which the bankruptcy court stated:

> All of the products liability suits have been effectively stayed by operation of Section 362 of the Code...the stay operates as a windfall benefit

> to co-defendants and insurance companies who, along with the debtor, enjoy many of the benefits of the moratorium. Nevertheless, for many reasons (perhaps including section 362 itself), products liability plaintiffs cannot dismiss a reorganization debtor and proceed against co-defendants only. 11 B.R. at 295.

These comments, however, are dicta. The scope of the automatic stay was not an issue in White Motor. Rather, White Motor involved the statutory authority of a bankruptcy judge to appoint a special master. Moreover, the cases relied upon by the bankruptcy judge to support his interpretation of the stay, Kalb v. Feuerstein, 308 U.S. 433 (1940) and Potts v. Potts, 142 F.2d 883 (6th Cir. 1944), cert. denied, 324 U.S. 868 (1945), did not involve the issue of the effect of the stay on co-defendants.[5]

In light of the clear language and legislative history of Section 362(a),

the promulgation of a specific provision to stay proceedings against co-defendants of Chapter 13 debtors and case law interpretation, this court holds that Section 362 is limited in scope to the debtor and does not operate to stay actions against the co-defendants of this debtor.

Moreover, it cannot be held that as a matter of law Manville is an indispensable party to the asbestos litigation. Under federal law, joint tortfeasors are not considered indispensable parties. Field v. Volkswagenwerk A.G., 626 F.2d 293, 298 n.7 (3d Cir. 1980); Herpich v. Wallace, 430 F.2d 792, 817 (5th Cir. 1970); Windert Watch Co., Inc. v. Pemex Electronics, Ltd., 468 F.Supp. 1242, 1246 (S.D.N.Y. 1979), 7 Wright & Miller, Federal Practice and Procedure §1623 at 241-42 (1973 & Supp. 1981).

Further, a universal finding that Manville is an indispensable party to all the thousands of cases in which it is currently a defendant is not possible on the facts before the court today. This is because the essential inquiry in determining indispensability has been articulated as follows:

> There are two essential tests of an indispensable party: (1) can relief be afforded the plaintiff without the presence of the other party? (2) can the case be decided on its merits without prejudicing the rights of the other party? Pickett v. Paine, 199 S.E. 2d 223 at 230, 230 Ga. 786 (1973).
>
> An indispensable party is one who must be joined because his nonjoinder is so prejudicial, both to his rights and to those of the parties already joined, that action cannot continue without him. Jones Knitting Corp. v. A.M. Pullen & Co., 50 F.R.D. 311, 314 (S.D.N.Y. 1970).

Accordingly, the determination of indispensability must be made on a

case-by-case basis by the courts across the country where the asbestos litigation is pending. The facts of a particular case may render Manville an indispensable party. For example, if Manville supplied the major portion of asbestos products in a particular location it could be held to be unfair to proceed in Manville's absence. That the indispensability is best determined on a case-by-case basis is illustrated by the divergent results reached by courts in applying a FRCP Rule 19 analysis. It would be most inappropriate for this court, without detailed knowledge of the specific factual contexts, to issue a sweeping ruling on Manville's indispensability. This ruling is property lodged with each individual trial court. This holding should not be construed to preclude consideration of stay extension

to non-debtor parties in a narrower setting where something more than the filing of a bankruptcy petition by a party is shown. See Royal Truck, supra.

2. Scope of Section 105 of the Bankruptcy Code Where No Statutory Basis Exists for the Grant of Stay Relief

Notwithstanding the limited focus of Section 362, the co-defendants propose that the Court use its powers under Section 105 of the Code so as to provide them with injunctive relief unavailable to them under Section 362. The issue thereby presented is whether the All Writs Statute embodied in Section 105 can be used where no statutory basis exists to grant stay relief. Although Section 105 may be used to extend the stay, Section 105 does not have a life of its own and this extension may only be accomplished within the proper boun-

daries of Section 362. That is, unless this extension is designed to protect the debtor's interests, it cannot be granted.

Section 105(a) of the Bankruptcy Code provides:

> The bankruptcy court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.

Section 105 of the Code was not intended to grant the bankruptcy court powers without bounds, In re Brada Miller Freight Systems, Inc., 6 C.B.C. 2d 375, 389 (N.D. Ala. 1981), and the court's equitable powers thereunder are not unrestricted. In re Dunckle Associates, Inc., 6 C.B.C. 2d 600, 605 (Bankr. E.D. Pa. 1982). See also 2 Collier on Bankruptcy ¶105.02 at 105-7 (15th ed. 1982). See also In re Chanticleer As-

sociates, Ltd., 592 F.2d 70 (3d Cir. 1979).

The crux of the matter before this Court is whether the injunctive relief sought by the co-defendants under Section 105(a) is "necessary or appropriate" in order to achieve the goals of a Chapter 11 reorganization. See In re Landmark Air Fund II, 19 B.R. 556, 559 (Bankr. N.D. Ohio 1982). A request for an injunction pending confirmation of the debtor's plans, such as the one requested by the co-defendants, is deemed a request for a preliminary injunction. See In re Larmar Estates, Inc., supra.

As articulated by Colliers treatise:

> Bankruptcy Rule 765 generally incorporates Rule 65 of the Federal Rules of Civil Procedure so that it is necessary to comply with Federal Rule 65 when seeking injunctive relief ....While the power may be

> broad under Section 105, the courts should be careful not to abuse it. Section 105 is not without limits. It does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules. The bankruptcy courts should exercise great care in this regard. 2 Collier on Bankruptcy ¶105.02 (15th ed. 1982).

Therefore, a party seeking the equitable relief of an extension of the stay must satisfy the requirements of FRCP 65 as applied to bankruptcy by Rule 765 of the Rules of Bankruptcy Procedure. The co-defendants here must show that without the sought-after relief, they will suffer irreparable injury and that they are likely to prevail on the merits. See Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975); In re Otero Mills, Inc., 21 B.R. 777 at 778-779 (Bankr. D.N.M. 1982). As explained by a leading authority.

> [T]he...court may, in the exercise of its discretion,

> property grant an interlocutory injunction when it is satisfied that there is a probable right and a probable danger and that the right may be defeated, unless the injunction is issued; and that the plaintiff is in substantial need of protection; and that the damage to him, if the injunction is denied, plainly outweights any foreseeable harm to the defendant. 7 (Pt. 2) Moore's Federal Practice ¶65.04[1] at 65-39 (2d ed. 1982). (emphasis added).

These requirements, particularly the balance of hardship in favor of the moving party, have been specifically adopted and enforced by the Second Circuit. The court in Sanders v. Airline Pilots Association, International, 473 F.2d 244(2d Cir. 1972), articulated this stringent standard, stating:

> The requirement that a party seeking a preliminary injunction demonstrate that it will suffer irreparable harm in the absence of preliminary relief necessitates more than a mere showing that the party seeking relief will see its relative position deteriorate. Preliminary injunctive relief is

> extraordinary relief. It requires a convincing demonstration that the balance of hardships tips decidedly toward the moving party. Id. at 248.

The co-defendants argue that they will suffer irreparable injury if Section 105(a) of the Code is not employed by this Court to expand the stay afforded the debtor by virtue of Section 362 to encompass co-defendants. It therefore follows, they argue, that because the co-defendants will suffer irreparable injury without the presence of Manville, Manville is an indispensable party to all of the litigation pending throughout the nation.

The co-defendants indicate a number of specific examples of the injuries they claim they will suffer without injunctive relief. First, they allege that there will be a multiplicity of actions resulting in an increased risk

of inconsistent verdicts and a great increase in litigation costs to the co-defendants. Second, they claim that the asbestos lawsuits contain issues of comparative negligence, apportionment among joint tortfeasors, and primary and secondary liability with respect to sellers of asbestos products and supplies of raw asbestos itself. They argue that without Manville as a party to the litigation, each defendant will not be able fairly to determine its shares of liability. Third, the co-defendants contend that their ability to obtain discovery and production of documents from Manville has been severely impaired by Manville's filing. Fourth, they argue that long-established coordinated defense efforts between Manville and the co-defendants will be devastated if the relief sought is not granted. Finally,

the co-defendants point out that Manville is currently in litigation with a number of insurance companies regarding questions of insurance coverage of asbestos-related claims. See e.g., Johns-Manville Corp. v. Home Insurance Company, No. 765226 (Calif. Sup. Ct., San Francisco County). The co-defendants urge that should it be established that Manville of is covered by insurance for some or all of the asbestos claims, then Manville's defense of those cases in the courts in which they arose would be able to go forward without a substantial detrimental effect on property of the estate.

The co-defendants rely upon In re Otero Mills, Inc., 21 B.R. 777, in their attempt to employ section 105 to enjoin actions not directly covered by Section 362. In Otero, the debtor had executed

a number of promissory notes which were guaranteed by its president. The holder of the notes brought suit against the president of the corporation to collect on the notes. The debtor argued that irreparable harm would result if the foreclosure were allowed because the property subject to the foreclosure was property which the president planned to sell with the intention that the proceeds be contributed to the debtor for the payment of corporate debts. The court agreed and extended the stay to encompass the debtor's president.

While it is true that in Otero a creditor was stayed from continuing an action against a non-debtor party, the case does not support the ubiquitous relief sought by the co-defendants. Otero sets forth the following standards for a court to employ in deciding whe-

ther to prohibit the continuance of a suit against a non-debtor party:

> The power to enjoin extends to some cases of a creditor's action against a co-debtor or guarantor, but only in limited circumstances. To so enjoin a creditor's actions against a third party, the court must find that failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debt or through that third party...This power to enjoin assures that a creditor may not do indirectly that which he is forbidden to do directly. Accordingly, 11 U.S.C. §105 permits this Court to enjoin a creditor's action against a third party co-debtor or guarantor when the proper showing is made by the party requesting the injunction....[Therefore, to obtain such a stay] the debtor must show:
> 1. Irreparable harm to the bankruptcy estate if the injunction does not issue;
> 2. Strong likelihood of success on the merits; and
> 3. No harm or minimal harm to the other party or parties.

Otero, 21 B.R. at 778-779 (citations omitted).

While these standards were met in Otero, it is abundantly clear that the first requirement cannot be met in the instant case. That Manville is basically indifferent to the co-defendants' requested relief is suggestive of a perception of a lack of irreparable harm to the debtor's estate if the injunction does not issue. Failure to extend the stay herein would not adversely or detrimentally influence or pressure Manville through the co-defendants. This is because the interests of Manville and the co-defendants at the individual trial level are not so interwoven as to create that undue influence. Thus, at least conceptually, a creditor does not impact Manville indirectly by proceeding against the co-defendants.

In addition, the co-defendants have made no showing with regard to the

second requirement. Moreover, the third requirement cannot be met. The asbestos victims will certainly suffer by the total frustration of their opportunity for a day in court. As Chief Judge Peckham stated in the context of asbestos litigation:

> Such delay is not costless to those plaintiffs, many of whom are suffering financial hardships and who seek damages to redress their injuries and some of whom are dying and whose testimony must be perpetuated. The defendants may be inconvenienced by expeditious resumption of the actions against them. However, under Landis, the balance of hardship weighs in favor of the injured plaintiffs.

In re Related Asbestos Cases, 23 B.R. 523, 531-2 (N.D. Cal. 1982) (citing Landis v. North American Company, 299 U.S. 248 (1936). Accord, Evans v. Johns-Manville Sales Corp., C.A. No. 80-2939, slip op. at 4-6 (D.N.J., October 5, 1982).

To the same effect, see In re Massachusettes Asbestos Cases, M.B.L. Nos. 1 & 2 (D. Mass. Sept. 28, 1982), in which the court denied a stay against third parties who were co-defendants of a debtor, stating:

> The suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. . . . Here, it is not a question of a fair possibility. It is certainty that any delay in the continuing efforts to bring these cases to trial will result in continued and increased hardship to the plaintiffs. This is not to ignore the problems of the defendants, but the loss to the plaintiffs far outweights any possible gain procedural or practical that would inure to them.

Slip Op. at 3.

In another case where a bankruptcy court applied the stringent requirements for injunctive relief in this Circuit,

relief was denied. In In re Larmar, supra, the bankruptcy court refused to exercise its injunctive powers under Section 105 because the party seeking relief had failed to make the necessary showing of irreparable harm. In Larmar, the Federal Deposit Insurance Corporation (the "FDIC") had commenced an action in state court prior to the Chapter 11 filing against the debtor and its guarantors and had obtained summary judgment on this action one day before the filing. Thereafter, the FDIC sought and obtained an order allowing it to enforce its state court judgment against the individual guarantors.

In granting the request to allow the action to go forward against co-defendants, the court articulated the stringent requirements which had not

been satisfied by the co-defendants, stating:

> The guarantors have not convinced this court that the balance of hardships tips decidedly toward the party seeking the injunction. Sanders, supra at 248. In addition, the guarantors have not shown how restraining the FDIC from going after them, is "necessary and [sic] appropriate" to carry out the provisions of Title 11. The guarantors have the burden of showing that the failure to stay the FDIC, would adversely affect the debtors' chances for successful reorganizations: They have failed to meet this burden. Accordingly, the court will not restrain the FDIC from enforcing the state court judgment against the guarantors. Larmar, 5 B.R. at 331-332.

Similarly, the co-defendants here have not satisfied their burden to demonstrate that the balance of hardships tips decidedly toward them and that they will suffer irreparable harm if the stay is not extended.

In sum, Section 105 of the Code cannot operate here to expand the scope of Section 362. Because Section 105 can only be used to allow a court to issue all "necessary or appropriate" orders to carry out the provisions of Title 11, it cannot be used to carry out an order in contravention of the narrow focus of Section 362. In an appropriate case, where the proposed extension of the stay is designed to cover actions against entities that truly are inextricably interwoven with the debtor or which affect property of the debtor's estate, Section 105 may be used. In the instant case, such is not the situation as any liability of these co-defendants is not directly attributable to the debtor as it would be if these co-defendants were, for example, key employees of the debtor. In order for these key employees to

be covered by the stay, it would have to be shown that they are prevented from carrying out their reorganization duties of plan formulation because of participation in the litigation. Co-defendants have not met their burden of proof in satisfying the injunctive relief standards for extending the stay by means of Section 105 of the Code.[6]

B. The Alternative Relief Sought

In the alternative, the co-defendants move this court to lift the automatic stay afforded Manville under Section 362 so as to allow the asbestos victims' lawsuits against Manville to continue to the point of judgment.

Section 362(d) of the Code provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this

> section, such as by terminating, annulling, modifying, or conditioning such stay--
> (1) for cause, . . .

The legislative history of Section 362(d) of the Code details what constitutes sufficient "cause" to modify the stay. It provides:

> . . . causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is an executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. Generally, proceedings in which the debtor is a fiduciary, or involving post-petition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances. House Report No. 95-595, 95th Cong., 1st Sess. 343-344(1977).

Based on the evidence before this court, it is clear that just cause does not exist for lifting the automatic stay provision of Section 362 as it applies to Manville. There can be no doubt that the force participation of a presently uninsured Manville in thousands of lawsuits would represent a tremendous burden on the estate. Because lifting the stay would have the negative effect of vitiating Manville's breathing spell and frustrating Manville's attempts at formulating a reorganization plan, the requested relief would detract from the goals of a Chapter 11 reorganization and must be denied.

It should be noted that in those cases where relief from the automatic stay was granted, the facts were in no way similar to those facts before this Court. More importantly, in thee other

cases, a denial of the request to lift the stay would have involved duplicative and wasteful relitigation of issues previously decided. The granting of the motion to lift the stay in these cases also represented no significant drain on estate assets.

For example, in In re McGraw, 18 B.R. 140 (Bankr. W.D. Wisc. 1982), the court granted relief from the stay of a creditor's single negligence action against the debtor and the debtor's former employer where the creditor agreed to seek enforcement of any judgment award only from the debtor's former employer under the doctrine of respondeat superior. The court pointed to the fact that the creditors would have had no remedy if the stay were not lifted and that the only cost to be incurred by the debtor would be the legal fees of a

single civil suit. See also In re Philadelphia Athletic Club, 9 B.R. 280 (Bankr. E.D. Pa. 1981), where the court allowed a single litigation to proceed in a state court because, among other reasons, the trial had been almost completed.

On the contrary, to grant the relief sought in the instant case will represent an overly burdensome drain on the estate as well as a frustration of the basic intent of Chapter 11 relief. Accordingly, this court denies the alternative relief sought by the co-defendants because they have not met their burden of demonstrating cause for lifting the automatic stay pursuant to Section 362(d).

V. Conclusion

Based upon the foregoing, this court, although it recognizes the co-defendants plight, finds no basis to extent the Section 362 stay to cover them by means of Section 105. In addition, for the reasons set forth hereinabove, this court will not lift or modify the Section 362 stay en masse to allow all suits against the debtor to proceed to judgment.

IT IS SO ORDERED

Dated: New York, New York
January 10, 1983

s/Burton R. Lifland
BANKRUPTCY JUDGE

1. In view of the holding of this Court on this motion it is not necessary for purposes of this decision to explore the impact of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ____ U.S. ___; 102 S. Ct. 2853; 9 B.C.D. 67 (1982) on a bankruptcy court's jurisdiction to try the pending asbestos cases. Furthermore, the authority of this Court to determine the automatic stay issues presented herein is set forth in Rule d(3)(A) of Emergency Bankruptcy Rule I adopted by the U.S. District Court for the Southern District of New York, which rule is the local counterpart of a suggested Rule of the Judicial Conference.

2. Unarco is a company similarly situated to Manville in that it also was a defendant in a plethora of asbestos lawsuits prior to filing in Chapter 11 earlier this year. The Unarco bankruptcy case, Case No. 82 B 9841 through 82 B 9851, is currently pending before the Honorable Edward Toles in the Bankruptcy Court of the Northern District of Illinois.

3. It is true, as the co-defendants indicate, that some courts have stayed the actions as to all defendants until further order of the court. For example, in Brandenburg v. Johns-Manville Sales Corporation, et al., Civil Action No .81-1832 (D.D.C. September 14, 1982) (attached to co-defendants Reply Memorandum of Law as Exhibit A), the court was persuaded that the

case was to be tried as a whole because under the facts in that particular case, the court found that "the common issues of law and fact, and the considerations herein make it important, if not necessary, to try this case as an entity and that any delay prejudicing plaintiff is outweighted by those considerations." Slip op. at 3.

Also, in Wedgeworth, et al v. Fibreboard Corp., et al, IV No. 80-203-B (M.D. La. September 28, 1982) (attached to co-defendant's reply memorandum as Exhibit B), the court stayed the proceedings as to all the parties and refused the plaintiff's request for severance. However, the court did not base its decision on the automatic stay. Rather, its relief on the general discretionary power of a district court to stay proceedings before it is in control of its docket and in the interests of justice. See slip op. at 5-6 citing Landis v. North American Co., 299 U.S. 248 (1939) and Mines v. D'Artois, 531 F.2d 726, 733 (5th Cir. 1976)). The Wedgeworth court was persuaded to exercise its discretion to stay the proceedings by its finding of the significant possibility of later actions against Johns-Manville and Unarco by plaintiffs as well as crossclaiming co-defendants, which actions would involve a great duplication of efforts. Also, the trial court found it doubtful whether the jury could fairly apportion liability in the absence of Johns-Manville and Unarco. More-

over, in Wedgeworth, the trial court found that Johns-Manville had, in fact, taken the lead in the defense of that particular action and that, therefore, its absence would seriously impede the defense efforts of all the co-defendants.

In the instances where trial courts have prohibited suits from going forward without Manville or Unarco, there were either specific trial court findings of indispensability or the stay was ordered separate and apart from Section 362. Accordingly, these asbestos cases cited by the co-defendants do not support the instant application for a broad and blanket extension of the automatic stay to cover all co-defendants in all suits on a global basis.

4. It should be noted that in an unreported decision, the bankruptcy court subsequently lifted the stay as to co-defendants and the district court thereafter proceeded with the litigation.

5. The district court subsequently vacated the bankruptcy court's order appointing a special master without commenting upon the bankruptcy courts dicta regarding the scope of the automatic stay. See In re White Motor Corp., 7 C.B.C. 2d 362 (N.D. Ohio 1982). Most recently, the Sixth Circuit has stayed the district court ruling and reinstated the bankruptcy court's order appointment a special master also

without commenting on the dicta regarding the scope of the automatic stay. See In re White Motor Credit Corp., No. 82-3638, Order by the Sixth Circuit dated November 15, 1982.

6. The denial of the co-defendants' principal prayer for relief is intended to govern the outcome in two Manville actions brought individually and separate and apart from the instant matter to determine the extent of the stay with regard to co-defendants.

One of these actions is brought by several Ohio plaintiff creditors by and through their attorney, Robert E. Branham, regarding the following pending actions:

Bowman, et al v. Armstrong World Industries, et al., C-2-81-1492;

Mary E. Braumann, et al v. Armstrong World Industries, et al, C-2-82-312;

Ronald L. Tatman, et al v. Armstrong World Industries, et al., C-2-82-359;

David Frank Young, et al v. Ottawa Silica, et al, C-2-82-523;

Bernice Beradum v. Armstrong World Industries, et al, 82-DV-03-1779

Pursuant to this Court's decision herein, these Ohio plaintiffs may proceed against the above-enumerated non-debtor co-

defendants.

The other case, Zenzen v. Johns-Manville, Adversary Proceeding No. 82-6420A, relates to an action entitled "Mr. and Mrs. David Zenzen, individually, a/n/f/ of Ryan Zenzen and Robin Zenzen, Minors v. Today Housing, et al.", 81-09928 currently pending in Harris County, Texas. The Zenzen family seeks an order from this court that will permit the continuation and completion of a state court trial against all defendants except Manville Forest Products Corp., which corporation plaintiffs never sued directly. Manville Forest Products Corp. is a third party defendant in this state court action.

At a hearing held on December 16, 1982, this Court ruled that the Zenzen family cannot proceed against Manville. As to whether the Zenzens may proceed against all other co-defendants, this Court reserved decision pending the outcome in the instant proceeding.

Pursuant to my decision herein, it is hereby ordered that the Zenzens may proceed against all defendants except Manville Forest Products Company in the state court action currently pending in Harris County, Texas.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re JOHNS-MANVILLE CORPORATION, et al.,	:	In Proceedings for a Reorganization under Chapter 11
Debtors,	:	
JOHNS-MANVILLE CORPORATION, et al.,	:	Case Nos. 82B11656 through 82B11676 (BRL)
Movants,	:	
-against-	:	CONSENT ORDER
KEENE CORPORATION, PACOR, INC., LaBRUM & DOAK and RAWLE & HENDERSON,	:	
Respondents.	:	

WHEREAS, on August 26, 1982 Movants Johns-Manville Corp. et al. ("Manville") filed petitions for reorganization under Chapter 11, §301 of the Bankruptcy Reform Act of 1978, as amended (the "Code") triggering the Automatic

Stay of §362 of the Code ("Automatic Stay"); and

WHEREAS, on August 26, this Court issued a Restraining Order to the same effect as the Automatic Stay; and

WHEREAS, as a result of the Automatic Stay and this Court's Restraining Order, the Court of Common Pleas of Philadelphia County ordered Manville severed as a defendant in approximately 2,000 pending asbestos related lawsuits; and

WHEREAS, on December 30, 1982, Respondents, Keene Corporation, Pacor, Inc., LaBrum & Doak and Rawle & Henderson moved in the Court of Common Pleas of Philadelphia County to vacate the severance of Manville and involve it as a defendant in trials scheduled to commence on January 10, 1983; and

WHEREAS, on January 6, 1983 Manville moved by order to show cause for a temporary restraining order which motion was granted by this Court; and

WHEREAS, on January 6, 1983 Manville moved by order to show cause for an order decreeing Respondents to be in contempt of this Court, enforcing the Automatic Stay and this Court's Restraining Order and directing Respondents to withdraw their motion to vacate the severance of Manville, a hearing on which was to be held on January 14, 1983; and

WHEREAS, Respondents have consented that the temporary restraining order issued by this Court on January 6, 1983 be extended indefinitely; and

WHEREAS, Keene Corporation and Pacor, Inc. have instructed and will continue to instruct their counselaround

the Country not to violate the Automatic Stay or this Court's Restraining Order and not to make any application to involve Manville as an active participant in any proceeding; and

~~WHEREAS, Respondents have con-~~ sented to withdraw before January 19, 1983 their motion filed with the Court of Common Pleas of Philadelphia County to vacate the severance of Manville in Morocco v. Johns Manville Corp., September Term, 1978, NO88(123)53 and any and all applications including letter applications to vacate severances of Manville in any and all other proceedings; it is ~~hereby~~

NOW ORDERED that the temporary restraining order issued by this Court on January 6, 1983 is extended indefinitely; and it is further

ORDERED that the hearing on Manville's application for an order of contempt and enforcement is continued without date and may be restored to the calendar on five days notice by either Movants or Respondents; and it is further

ORDERED that Respondents withdraw before January 19, 1983, their motion pending in the Court of Common Pleas of Philadelphia County for an order vacating the severances of Manville in the case of Morocco v. Johns-Manville and any other asbestos related case, [and any and all applications including letter applications to vacate severances of

Manville in any and all of the proceedings.]*

Dated: New York, New York
January 14, 1983

s/ Burton R. Lifland
BURTON R. LIFLAND
UNITED STATES BANKRUTPCY JUDGE

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* Interlineated by Bankruptcy Judge Burton R. Lifland.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, §§ 1-2 provide in relevant part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.
>
> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the Untied States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; --

between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (1978), provides in relevant part:

> Title 28 of the United States Code is amended by inserting immediately after chapter 89 the following:
>
> § 1471. Jurisdiction
>
> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 401, 92 Stat. 2549, 2682 (1978), provides in relevant part:

Sec. 401(a). The Bankruptcy Act is repealed.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 404, 92 Stat. 2549, 2683-2685 (1978), provides in relevant part:

COURTS DURING TRANSITION

Sec. 404(a). The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and existing on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the amendments made by this Act. Each of the courts of bankruptcy so continued shall constitute a separate depart-

ment of the district court that is such court of bankruptcy under the Bankruptcy Act.

Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405, 92 Stat. 2549, 2685 (1978), provides:

JURISDICTION AND PROCEDURE DURING TRANSITION

Sec. 405.(a)(1) All cases commenced under title 11 of the United States Code during the transition period shall be referred to the United States bankruptcy judges. The United States bankruptcy judges may exercise in such cases the jurisidction and powers conferred by subsection (b) of section on the courts of bankruptcy continued by section 404(a) of this Act, and all proceedings in such cases shall be before the United States bankrutpcy judges, except --

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt--

(i) not committed in the bankruptcy judge's actual presence; or

(ii) warranting a punishment of imprisonment; or

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge.

(2) Except as provided in subsection (c) of this section, any proceeding in a court of bankruptcy in a case under title 11 of the United States Code that is not before the United States bankruptcy judge shall be before the judge of the court of bankruptcy for the district in which such case is pending.

(b) During the transition period, the amendments made by sections 241, 243, 250, and 252 of this Act shall apply to the courts of bankruptcy continued by section 404(a) of this Act the same as such amendments apply to the United States bankruptcy courts established under section 201 of this Act.

(c)(1) During the transition period, an appeal from a judgment, order, or decree of a United States bankruptcy judge shall be --

(A) if the circuit council of the circuit in which the bankruptcy judge sits so orders for the district in which the bankruptcy judge sits, then to a panel of three bankruptcy judges appointed in the manner prescribed by section 160 of title 28 of the United States Code, as added by section 201 of this Act;

(B) if the parties to the appeal agree to a direct appeal to the court of appeals for such circuit, then to such court of appeals; or

(C) to the district court for the district in which the bankruptcy judge sits.

(2) During the transition period, the jurisdiction of the district courts, the courts of appeals, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by sections 236, 237, 238, and 241 of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under section 201 of this Act.

(d) The rules prescribed under section 2075 of title 28 of the United States Code and in effect on September 30, 1979, shall apply to cases under title 11, to the extent not inconsistent with the amendments made by this Act, or with this Act, until such rules are repealed or superseded by rules prescribed and effective under such section, as amended by section 248 of this Act.

28 U.S.C. § 1331 provides:

§ 1331. Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1334 (effective date Apr. 1, 1984) [referred to as new 28 U.S.C. § 1334], provides:

§ 1334. Bankruptcy matters and proceedings.

Amendment
Effective April 1, 1984

Pub.L. 95-598, Title II, § 238(a), Title IV, § 402(b), Nov. 6, 1978, 92 Stat. 2668, 2682, provided that, effective Apr. 1, 1984, the section catchline and text are amended to read as follows:

§ 1334. Bankruptcy appeals

(a) The district courts for districts for which panels have not been ordered appointed under section 160 of this title shall have jurisdiction of appeals from all final judgments, orders, and decrees of bankruptcy courts.

(b) The district courts for such districts shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken.

(c) A district court may not refer an appeal under that section to a magistrate or to a special master.

28 U.S.C. § 1334 [referred to as old 28 U.S.C. § 1334], provides:

§ 1334. Bankruptcy matters and proceedings.

The district courts shall have original jurisdiction, exclusive of courts of the States, of all matters and proceedings in bankruptcy. June 25, 1948, C. 646, 62 Stat. 931.

11 U.S.C. § 362 in relevant part provides:

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

BACKGROUND OF THE ASBESTOS CASES

The Asbestos Cases arise out of extensive use of thermal insulation products containing asbestos in the construction industry and shipyards. There was an increase in the use of this insulation starting with shipbuilding in World War II and the construction boom following the war.

In 1965 Dr. Irving Selikoff, Chief of Mount Sinai's Environmental Medicine Program, published a study called "The Occurrence of Asbestosis Among Insulation Workers in the United States." Dr. Selikoff's study of the asbestos workers' union indicated that some insulation workers were contracting a deleterious condition called asbestosis. Following Dr. Selikoff's study, warnings

were placed on thermal insulation products containing asbestos and attempts were made to find a substitute for asbestos.

By 1972, substitutes had been found for asbestos in some thermal insulation products and other thermal insulation products for which no asbestos substitute could be found were discontinued. Asbestos continued to be used in other areas.

Types of Suits-- Personal Injury, Property Damage

There are two types of Asbestos Cases: (1) personal injury lawsuits brought by persons who claim they are suffering from an asbestos-related condition and (2) property damage lawsuits in which the plaintiff claims injury to his property because of the presence of

asbestos. The typical suit pleads strict liability, ngeligence (including failure to warn) and breach of warranty. Some suits contain conspiracy allegations and some seek punitive damages. Punitive damages are generally actively pursued against companies such as Manville which are claimed to have had early knowledge of asbestos-related conditions and to have done nothing to prevent injury to the public.

There are approximately 12,000 Asbestos Cases pending nationwide against various defendants in both state and federal courts. More than half of these cases arise out of the shipyards, and there are large concentrations of cases in coastal states such as Pennsylvania, Mississippi, Louisiana, Texas and California. Some court systems have

more than 2,000 cases presently pending. In Philadelphia alone, trials of the 2,000 cases in that jurisdiction have commenced at the rate of five per week.

Asbestos personal injury cases are usually brought by insulators, members of the asbestos workers' union, members of allied trades such as welders or painters; a few claim to have come in contact with asbestos by the fibers brought home on the clothes of the worker, so-called household exposures or laundry cases. Many cases have been brought by school districts.

Defendants

Typically, parties named as defendants in the Asbestos Cases include participants at every level of the chain of distribution of asbestos-containing

thermal insulation products: asbestos fiber miners, fabricators of raw asbestos, manufacturers of asbestos-containing thermal insulation products, distributors of such products, insulation contracting companies, and life and casualty insurance carriers, who have at one time or another provided insurance coverage for one or more of the foregoing companies.

The problem is exacerbated by the fact that it is frequently difficult to identify the insurance carrier which issued coverage thirty to forty years ago and by the fact that there are diverse theories asserted by carriers for determining coverage in given cases which provide the basis for denying coverage or reserving rights.

For decades the United States Government was a supplier, specifier, consumer and promoter of asbestos products. Some claimants in the Asbestos Cases have alleged injurious exposure to asbestos dust while working in shipyards owned by or under contract to the U.S. Navy. It has been alleged that the Government knew of the potential hazards from asbestos exposure as early as the 1930s yet made little or no effort to educate its workers or to institute adequate workplace practices.

Over two hundred companies other than Manville have been named as co-defendants in one or more Asbestos Cases. Manville has been, in many cases, the architect of the co-defendants' involvement. Seeking to limit its own exposure and to compel spreading

of the liability, Manville regularly impleaded the co-defendants in actions where the claimants themselves did not name them as parties. Approximately ten to twenty co-defendants, as well as Manville, are present in most of the suits even though, in many instances, Manville was the supplier of the raw asbestos fiber. These co-defendants have claims for contribution and indemnity against Manville, many of which have been asserted in cross claims or separate action.

Asbestos Related Injuries

In recent years it has been found that significant and repeated inhalation of asbestos fibers, usually over relatively long periods of time, can lead to the development of deleterious condi-

tions such as asbestosis and mesothelioma. The clinical symptoms of these conditions may not appear until 20 to 40 years after initial inhalation of asbestos fiber. Asbestosis is a scarring of the lung which gradually restricts the capacity of the lung to function. Mesothelioma is a malignant tumor of the lining of the lung or the stomach cavity.

Studies of asbestos workers have shown an increase in lung cancer over the statistical incidence expected in the general population. The cases of lung cancer are almost invariably seen in workers who smoke. Thus, it is uncertain whether inhalation of asbestos fibers causes lung cancer.

In the late 1960's and early 1970's there were only a few Asbestos Cases

pending and these were brought primarily against asbestos mining companies such as Manville and manufacturers of thermal insulation products containing asbestos. Starting in 1976 the number of Asbestos Cases grew exponentially. There were approximately forty-two cases pending as of January 1, 1976; by August 1982, when Manville filed its Chapter 11, 11,000 cases were pending.

MANVILLE'S CRITICAL AND PERVASIVE INVOLVEMENT IN THE ASBESTOS CASES

Manville has played a key role in the Asbestos Cases because (a) it is the largest miner, processor, manufacturer and supplier of asbestos fiber and of products containing asbestos, (b) it is the manufacturer most frequently named by claimants, (c) it has been named by

co-defendants in thousands of cross-claims and third party complaints for contribution and indemnity, (d) it has acted as lead defendant in most of the Asbestos Cases, and (e) it has been the largest contributor to settlement and judgments.

In the year 1980, it reported having mined over 600,000 tons of chrysotile asbestos fiber. It is by far the insulation manufacturer most frequently identified by plaintiffs in the Asbestos Cases and, in many instances, its products are the only ones which a claimant can recall having handled.

Plaintiffs in the Asbestos Cases frequently allege that Manville had unique knowledge of the dangers of asbestos well prior to Dr. Irving Selikoff's report. Based upon prima facie

proof of such facts, in several Asbestos Case courts have allowed juries to consider awarding punitive damages against Manville.

Because of its pre-eminent role in the manufacture and supplying of asbestos, Manville has typically taken the "lead" position in defense of the Asbestos Cases, in many instances acting as custodian of relevant documents and providing for the retention of witnesses and expert testimony. In other instances, Manville has been designated lead counsel or liaison counsel by the trial court.

In practical terms, it has frequently been counsel for Manville who has served claimants with interrogatories on behalf of all defendants, scheduled virtually all depositions of plain-

tiffs and co-workers, arranged for pre-trial medical examinations, evaluated plaintiffs' medical records, represented the defendants as a group at conferences with the court, served as custodian of documents, taken the lead in the filing of the responses to motions (often filing on behalf of most of the co-defendants), and represented all co-defendants as a group at settlement discussion with claimants' counsel. At trial, Manville has consistently taken the lead in the joint defense by cross-examining plaintiffs' experts and by retaining experts on behalf of all co-defendants.

Without Manville in the Asbestos Cases, the ability of the other defendants to prepare their defense on the eve of trial is substantially impaired. In addition, the possibility of settle-

ment is at best remote without the presence of the party which has historically paid the largest share of these settlements.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
Washington D.C. 20544

William E. Foley, Director
Joseph F. Spaniol, Jr., Deputy Director

September 27, 1982

MEMORANDUM TO ALL: JUDGES, UNITED STATES COURTS OF APPEAL; JUDGES, UNITED STATES DISTRICT COURTS; JUDGES, UNITED STATES BANKRUPTCY COURTS; CLERKS, UNITED STATES BANKRUPTCY COURTS

SUBJECT: The Bankruptcy Court System after October 4, 1982 in Absence of Congressional Action

The Supreme Court's recent decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., et al., 102 S. Ct. 2858 (1982) held that the broad grant of jurisdiction to bankruptcy judges under the 1978 Act violates Article III of the Constitution. In applying its decision prospectively, the

Court stayed its judgment until October 4, 1982 in order to afford the Congress an opportunity to reconstitute the bankruptcy courts or adopt some other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.

During July and August, both the House and Senate held hearings on this important issue. Earlier this month, the Executive Committee of the Judicial Conference provided the Congress with its views and offered draft legislation for revision of the current law in order to satisfy the Supreme Court's decision, with a minimum of disruption to the bankruptcy court structure. While it is hoped that the Congress will take affirmative action to remedy the constitutional defects in the bankruptcy law before the stay terminates on October 4,

it is possible it may not have time to do so.

Therefore, the following is the view of the Administrative Office of the United States Courts of the status of the bankruptcy law during the transition period ending March 31, 1983 if the Congress fails to act by October 4 and no extension of the stay is granted.

In Marathon, the Court found that certain powers assigned to bankruptcy judges by the 1978 Bankruptcy Act could be constitutionally exercised only by an Article III judge. The Court refused to sever the unconstitutional excess and thus struck the Act's assignment of powers to bankruptcy judges in its entirety, effective October 5, 1982.

Marathon does not cause a jurisdictional lapse. The Administrative Office concludes that Marathon did not invali-

date 28 U.S.C. sections 1471(a), (b). In addition, sections 404 and 405 of the 1978 Act also vest bankruptcy powers in the district courts as "courts of bankruptcy" until 1984.

The attached rule is an interim measure by which district courts may delegate many of their bankruptcy powers to bankruptcy judges. The authority for this is found in section 105 of the 1978 Act (11 U.S.C. sec. 105), which gives courts of bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," and in Bankruptcy Rule 927, which gives bankruptcy courts the power to adopt "rules governing practice and procedure under the Act." This delegation of power is consistent with the long tradition of a bankruptcy court consisting of two judi-

cial officers and the clear intent of the Congress to continue a two-officer court of bankruptcy through 1984.

Under the Rule, all bankruptcy matters are initially referred to a bankruptcy judge. [Section b(1) of the Rule.] In proceedings not involving a final judgment in a Marathon claim, the bankruptcy judge may enter orders and judgments that become effective immediately, subject to district court review if requested by a party. [Section (c)(2).] With respect to final judgments in Marathon claims, the bankruptcy judge prepares recommended findings and conclusions and a proposed judgment. [Section (c)(3).] A district judge then reviews the recommendation and enters a judgment. [Section (c)(5).] Where the bankruptcy judge certifies that circumstances require, an order or judgment

entered by a bankruptcy judge will be confirmed by a district judge even if no objection is filed.

The district court will provide expedited review or confirmation of any order, judgment, or proposed judgment where the bankruptcy judge certifies prompt review is necessary.

s/ William E. Foley
William E. Foley

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WINTERS NATIONAL BANK & TRUST COMPANY OF DAYTON	*	ADV. NO. 3-82-0491
PLAINTIFF	*	
-vs	*	SUPPLEMENTAL DECISION AND ORDER
SCHEAR GROUP, ET AL.,	*	
DEFENDANTS		

IN THE MATTER OF	*	CASE NO. 3-82-01843
THE SCHEAR REALTY & INVESTMENT CO., INC.	*	IN CHAPTER 11
DEBTOR	*	PROCEEDINGS

FINDINGS OF FACT

This matter is before the Court as one of innumerable other cases wherein jurisdiction has been exercised pursuant and conformably to the judgment stay entered by the Supreme Court of the United States in Northern Pipeline Construction Co., v. Marathon Pipe Line Co.,

102 S.Ct. 2858, 73 L. Ed.2d 598, 6 C.B.C. 785, 9 B.C.D. 67 (1982) (hereinafter "Northern"). (stayed until December 24, 1982.

This case involves the exercise of jurisdiction in a foreclosure suit brought under state law to enforce private contractual obligations among litigants, by operation of law residents of the same state (Ohio) and removed to this Court pursuant to jurisdiction vested in the Bankruptcy Courts conformably to 28 U.S.C. §1471, as extended by the stay of the Supreme Court until December 24, 1982.

On 15 December 1982 this Court entered the following order,

> This matter is before the Court upon Motion to Remand filed on 4 October 1982 (along with a supplemental memorandum) by the Winters National Bank & Trust Company of Dayton (hereinafter WNB). The Court considered the Motion at a conference held on 2 November 1982,

at which time the parties agreed that the Court could render decision on the Motion based upon the record without the necessity of further hearing. Debtor subsequently filed a Memorandum in Opposition to the Motion to Remand.

The instant Complaint, filed by WNB in the Montgomery County (Ohio) Common Pleas Court on 21 June 1982 names a number of parties as defendants, including Debtor. The Complaint essentially requests foreclosure on several properties (some of which appear to belong to Debtor) based upon several notes (one of which appears to be an obligation of Debtor).

WNB argues in favor of remand on two grounds: first, lack of jurisdiction in light of the decision by the United States Supreme Court in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 U.S. 2858 (June 28, 1982); and second, "equitable considerations" as elaborated in this Court's opinion in T.L.C. Inc. v. Ebrights Refrigeration Equipment, Inc., 13 B.R. 546, 4 C.B.C.2d 1543 (1981). Basically, WNB contends that this Court is an inapparopriate forum because the instant Complaint raises largely state law questions determative of the

rights of nonbankrupt litigants.

Debtor responds that the portions of the Complaint which have not been settled and are in dispute directly involve or affect Debtor or Debtor's estate. Debtor notes that this matter is closely related to two pending adversary proceedings involving the same parties and properties in the context of creditor requests for relief from the automatic stay of 11 U.S.C. §362. See, Adversarial Proceedings No. 3-82-0421 and No. 3-82-0460.

It is the determination of this Court that it should continue to exercise jurisdiction under 28 U.S.C. §1471, as elaborated and qualified in this Court's opinion in Benchic v. Century Entertainment Corp., Case No. 3-81-04024, Adv. No. 3-81-0242 and 3-81-0516 (December 7, 1982).

It is the further determination of the Court, however, that it would be premature to issue a final resolution of the remand question prior to the Court's determination of the related requests for relief from the automatic stay in Adversarial Proceedings No. 3-82-0421 and No. 3-82-0460, and also prior to the filing of a proposed Plan of Reorganization, as both are necessary to

determine the extent of the connection of Debtor's estate, and administration thereof, to the instant Complaint.

IT IS THEREFORE ORDERED that the ultimate resolution of the instant Motion to Remand is RESERVED, until further order of the Court conformably to Interim Bankruptcy Rule of Procedure 7004(j).

The matter is now before the Court upon the following Orders entered on December 21, 1982 by the Judicial Council of the Sixth Circuit and by The United States District Court for the Southern District of Ohio (hereinafter the "Orders") on December 23, 1982, which read as follows:

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

ORDER

Acting pursuant to the authority vested in the Judicial Council by 28 U.S.C. §332(d), the Judicial Council of the Sixth Circuit concludes that the uniform effective and expeditious administration of justice within this Circuit requires that the attached rule for the administration of the

bankruptcy system in this Circuit be adopted by the District Courts of this Circuit pursuant to 11 U.S.C. §105.

It therefore is ordered that each District Court of this Circuit adopt the attached rule to become effective December 25, 1982 if the Congress fails to enact remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. vs. Marathon Pipe Line Co., ___ U.S. ___, 102 S.Ct. 2858 (1982), and if the Suprme Court fails to extend the stay of its mandate in that case.

For the Council:

[signed]
George Edwards,
Chief Judge
Sixth Circuit

Date: December 21, 1982

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

R U L E

(a) Emergency Resolution

The purpose of this rule is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act

in bankruptcy cases and proceedings until Congress enacts appropriate remedial legislation in response to the Supreme Court's decision in Northern Pipeline Construction Co. vs. Marathon Pipe Line Co., ___ U.S. ___, 102 S.Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

The judges of the district court find that exceptional circumstances exist. These circumstances include: (1) the unanticipated unconstitutionality of the grant of power to bankruptcy judges in section 241(a) of Public Law 95-598; (2) the clear intent of Congress to refer bankruptcy matters to bankruptcy judges; (3) the specialized expertise necessary to the determination of bankruptcy matters; and (4) the administrative difficulty of the district court's assuming the existing bankruptcy caseload on short notice.

Therefore, the orderly conduct of the business of the court requires this referral of bankruptcy cases to the bankruptcy judges.

(b) Filing of bankruptcy papers

The bankruptcy court constituted by §404 of Public Law 95-598 shall continue to be known as the United States Bankruptcy Court in this dis-

trict. The Clerk of the Bankruptcy Court is hereby designated to maintain all files in bankruptcy cases and adversary proceedings. All papers in cases or proceedings arising under or related to Title 11 shall be filed with the Clerk of the Bankruptcy Court regardless of whether the case or proceeding is before a bankruptcy judge or a judge of the district court, except that a judgment by the district judge shall be filed in accordance with Rule 921 of the Bankruptcy Rules.

(c) Reference to Bankruptcy Judges

(1) All cases under Title 11 and all civil proceedings arising under Title 11 or arising in or related to cases under Title 11 are referred to the bankruptcy judges of this district.

(2) The reference to a bankruptcy judge may be withdrawn by the district court at any time on its own motion or on timely motion by a party. A motion for withdrawal of reference shall not stay any bankruptcy matter pending before a bankruptcy judge unless a specific stay is issued by the district court. If a reference is withdrawn, the district court may retain the entire matter, may refer part of the

matter back to the bankruptcy judge, or may refer the entire matter back to the bankruptcy judge with instructions specifying the powers and functions that the bankruptcy judge may exercise. Any matter in which the reference is withdrawn shall be reassigned to a district judge in accordance with the Court's usual system for assigning civil cases.

(3) Referred cases and proceedings may be transferred in whole or in part between bankruptcy judges within the district wihtout approval of a district judge.

(d) Powers of Bankruptcy Judges

(1) The bankruptcy judges may perform in referred bankruptcy cases and proceedings all acts and duties necessary for the handling of those cases and proceedings except that the bankruptcy jduges may not conduct:

(A) a proceeding to enjoin a court;

(B) a proceeding to punish a criminal contempt --

(i) not committed in the bankruptcy Judge's actual presence; or

(ii) warranting a punishment of imprisonment;

(C) an appeal from a judgment, order, decree, or decision of a United States bankruptcy judge; or

(D) jury trials.

Those matters which may not be performed by a bankruptcy judge shall be transferred to a district judge.

(2) Except as provided in (d)(3), orders and judgments of bankruptcy judges shall be effective upon entry by the Clerk of the Bankruptcy Court, unless stayed by the bankruptcy judge or a district judge.

(3)(A) Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate. Related proceedings do not include: contested and uncontested matters concerning the administration of the estates; allowance of and objection to claims against the estate;

counterclaims by the estate in whatever amount against persons filing claims against the estate; orders in respect to obtaining credit; orders to turn over property of the estate; proceedings to set aside preferences and fraudulent conveyances; proceedings in respect to lifting of the automatic stay; proceedings to determine dischargeability of particular debts; proceedings to object to the discharge; proceedings in respect to the confirmation of plans; orders approving the sale of property where not arising from proceedings resulting from claims brought by the estate against parties who have not filed claims against the estate; and similar matters. A proceeding is not a related proceeding merely because the outcome will be affected by state law.

(B) In related proceedings the bankruptcy judge may not enter a judgment or dispositive order, but shall submit findings, conclusions, and a proposed judgement or order to the district judge, unless the parties to the proceeding consent to entry of the judgment or order by the bankruptcy judge.

(e) District Court Review

(1) A notice of appeal from a final order or judgment

of a bankruptcy judge or an application for leave to appeal an interlocutory order of a bankruptcy judge, shall be filed within 10 days of the date of entry of the judgment or order or of the lodgment of the proposed judgement or order. As modified by sections (e)2A and B of this rule, the procedures set forth in Part VIII of the Bankruptcy Rules apply to appeals of bankruptcy judges' judgments and orders and the procedures set forth in Bankruptcy Interim Rule 8004 apply to applications for leave to appeal interlocutory orders of bankruptcy judges. Modification by the district judge or the bankruptcy judge or time for appeal is governed by Rule 802 of the Bankruptcy Rules.

(2) (A) A district judge shall review:

(i) an order or judgment entered under paragraph (d)(2) if a timely notice of appeal has been filed or if a timely application for leave to appeal has been granted;

(ii) an order or judgment entered under paragraph (d)(2) if the

bankruptcy judge certifies that circumstances require that the order or judgment be approved by a district judge, whether or not the matter was controverted before the bankruptcy judge or any notice of appeal of application for leave to appeal was filed; and

(iii) a proposed order or judgment lodged under paragraph (d)(3), whether or not any notice of appeal or application for leave to appeal has been filed.

(B) In conducting review, the district judge may hold a hearing and may receive such evidence as appropriate and may accept, reject, or modify, in whole or in part, the order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy judge. At the conclusion of the review, the

district judge shall enter an appropriate order or judgment.

(3) When the bankruptcy judge certifies that circumstances require immediate review by a district judge or any matter subject to review under paragraph (e)(2), the district judge shall review the matter and enter an order or judgment as soon as possible.

(4) It shall be the burden of the parties to raise the issue of whether any proceeding is a related proceeding prior to the time of the entry of the order or judgment of the district judge after review.

(f) Local Rules

In proceedings before a bankruptcy judge, the local rules of the bankruptcy court shall apply. In proceedings before a judge of the district court, the local rules of the district court shall apply.

(g) Bankruptcy Rules and Title IV of Public Law 95-598

Courts of bankruptcy and procedure in bankruptcy shall continue to be governed by Title IV of Public Law 95-598 as amended by the bankruptcy rules prescribed by the Supreme Court of the United States pursuant to 28 U.S.C. §2075 and limited by SEC. 405(d) of the

Act, to the extent that such Title and Rules are not inconsistent with the holding of Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 102 S.Ct. 2858 (1982).

(h) Effective Date and Pending Cases

This rule shall become effective December 25, 1982, and shall apply to all bankruptcy cases and proceedings not governed by the Bankruptcy Act of 1898 as amended, and filed on or after October 1, 1979. Any bankruptcy matters pending before a bankruptcy judge on December 25, 1982, shall be deemed referred to that judge.

I.

The opinion now expressed herein in summary fashion will be the basic ratio decidendi in the innumerable pending cases and adversarial proceedings now pending in this Court as guidance to the large number of attorneys whose clients'

causes have been posited into a jurisdictional vacuum.

The "Orders" obviously represent a noble and Herculian attempt to provide at least a provisional answer to the plight of litigants involved in Bankruptcy Court cases involving the personal and property rights in over 700,000 pending cases nationwide (18,217 cases filed during fiscal year 1982 in this District); and, the personal and property rights of affected parties nationwide reaching into billions of dollars in jeopardy financially, as well as the life blood of thousands of employers and employees, vital to national well being.

Dedicated and professionally capable bankruptcy judges, probably more than any other group, have been aware of the jurisdictional problems which have jeopardized such socio-economic interests for

decades (at least since 1965), and long prior to the enactment by the Congress of the Bankruptcy Reform Act of 1978 (hereinafter the "Code") designed to mitigate the inordinate costs and resources wasted because of archaic methods of judicial administration in bankruptcy cases which have historically involved the "...broadest spectrum of other laws."*

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*. "The present purposes of the Bankruptcy Act are twofold; either to rehabilitate financially a distressed debtor or to assemble and liquidate his assets for distribution to creditors.

In either kind of proceeding, the nature of bankruptcy is to sort out all of the debtor's legal relationships with others, and to apply the principles and rules of the bankruptcy laws to those relationships Bankruptcy is mainly a procedural devise, prescribing the method of accomplishing rehabilitation or liquidation, but generally leaving undisturbed legal relationships that existed before bankruptcy. To this end, the Bankruptcy Act incorporates State and general Federal Law in many important areas. The bankruptcy judge must apply to the many diverse and frequently complex fact patterns that arise in the typical bankruptcy case this general body of law, as well as apply the bankruptcy

(footnote continued)

Since this Code jurisdiction, as found to be unconstitutional, cannot now be exercised in the Bankruptcy Courts it becomes necesary to assist the litigants

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(footnote continued from previous page)
law:

> 'The variety of legal issues encountered is almost endless. The Bankruptcy Act requires application of the broadest spectrum of other laws governing, for example, taxes, torts, negotiable instruments, contracts, spendthrift and other trusts, mortgages, conveyances, landlord and tenant relationships, partnerships, mining, oil and gas extraction, domestic relations, labor relations, insurance, Securities and Exchange Commission statutes, regulations and decisional law
> ***
> [in one recent bankruptcy case, In re Fotochrome] the bankruptcy judge was called upon to decide an international conflict of law question involving sections of the Japanese Civil Code; to construe certain treaties of commerce and navigation, and to give effect to a postpetition aware by the International Arbitration Tribunal. Bankruptcy courts are frequently

(footnote continued)

in reaching a forum to resolve their legal controversies. The Supreme Court provided the Congress with the opportunity to resolve by corrective legislation this constitutional problem either within the Bankruptcy Court structure or by ulterior methods in the federal or state courts. We are constrained to conclude now that the only existing forums available are the state courts, though fully

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(footnote continued from previous page) confronted with constitutional issues. Much of the decisional law surrounding the requirement of the fifth amendment with respect to property rights derives from bankruptcy cases. The courts have also considered issues such as State sovereignty and federalism; first amendment rights; the scopt [sic] of the contracts clause; the jurisdiction and powers of Federal Courts; the legitimacy of congressional grants of jurisdiction, to name only a few that have arisen. The issues resolved at the trial level in the bankruptcy court system are myriad. With the proposed expansion of jurisdiction granted under H.R. 8200 the scope of issues will surely grow." H.R. Rep. 95-595, 95th Cong., 1st Sess. 10 (1977); 9 Bkr. L.Ed. §§82:2, p. 18. [citations omitted]

cognizant of the exhaustive research and legislative efforts which lead the Congress to confront historic anachronisms in judicial administration in developing the 1978 Bankruptcy Code. This massive effort was exerted in the legislative process for at least a decade of acknowledged dire need.

§22 of the Bankruptcy Act (11 U.S.C. §45) as to referring cases to Referees, §23 (11 U.S.C. §46) as to the jurisdiction of United States and State Courts; §38 (11 U.S.C. §66) as to jurisdiction of Referees; and §39 (11 U.S.C. §67) as to duties of Referees, were all repealed by Pub L. 95-598, 92 Stat. 2683 §§401, 403, which repealed the Bankruptcy Act in toto, excepting certain saving provisions as to cases then pending and the status of United States Bankruptcy Judges then serving. Upon such repeal of the Bank-

ruptcy Act, §§301, 302, 303 and 304 of the Bankruptcy Code superseded the applicable Bankruptcy Rules as adopted by the United States Supreme Court adapted in 1973, to govern references by District Judges and the exercise of jurisdiction by Bankruptcy Judges.

Furthermore, the plurality opinion in Northern Pipeline has even placed into question the constitutionality of pre-1978 procedures repealed by the 1978 Code because "...those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee [citation omitted], have never been explicitly endorsed by this Court...." 9 B.C.D. at page 81, note 31. The Bankruptcy Court exclusive jurisdiction derived from 28 U.S.C. § 1471(e) "over property of the debtor" was not,

however, explicitly found unconstitutional in Northern Pipeline.

The jurisdictional fiction as attempted by the Orders instanter under consideration purporting to legislate delegated jurisdiction to the Bankruptcy Courts from the District Courts can rise no higher in effect than the Congressional legislation found unconstitutional. It is noteworthy; that 28 U.S.C. §1651(a) and 11 U.S.C. §105 (All Writs Statute) supply jurisdiction to federal courts to issue only "...all write necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law." [empahsis added].

All Courts of the United States are courts of limited jurisdiction. The federal district courts have only the powers granted to them by the Congress.

Article III, Section 1 of the Constitution creates the Supreme Court of the United States, but delegates to Congress the constitutional power to create all inferior federal courts and thereby to establish their jurisdiction (within, of course, limitations on this power such as the Sixth, Seventh and Eleventh Amendments).

The District Courts have traditionally been the basic Article III courts of first instance in the United States judicial system and have been invested with jurisdiction over federal crimes, admiralty, bankruptcy, and jurisdiction based upon diversity of citizenship or a "federal question." See 28 U.S.C. §§1331, 1332-34.

The jurisdiction of the District Courts in bankruptcy is now derived from and limited by 11 U.S.C. §1334. Juris-

diction as courts of bankruptcy under §2(a) of the repealed Bankruptcy Act (11 U.S.C. §11) cannot fill the deplorable void now confronting litigants - (because repealed by Public Law 95-598). Although the question of jurisdiction over bankruptcy related litigation conferred upon Bankruptcy Judges as "Article I" judges is virtually impossible to resolve from Northern Pipeline, there can be little doubt that no Article III jurisdiction was conferred by 28 U.S.C. §1471 on District Judges. The legislative device of constituting an independent Bankruptcy Court as "adjuncts" of the District Court was found to be unconstitutional and a "facade" not vesting any real jurisdiction in the District Court. See Northern Pipeline, 9 B.C.D. , pp. 78, 84. 28 U.S.C. §1471 very clearly precluded any jurisdictional grant to District Courts

as a matter of obvious legislative intent. In so finding, the plurality in Northern Pipeline predicated its conclusion on the literal terms of the statute, that all of the jurisdictional reference to the District Courts was automatically and conclusively conferred on the new, independent Bankruptcy Courts.

As previously held by this Court, the Bankruptcy Court as constituted, has no legislated jurisdiction or authorization to transfer to a District Court a proceeding, whether or not the Bankruptcy Court has jurisdiction. Benchic, et al. v. Century Entertainment Corp., et al (in re Century Entertainment Corp.) 9 B.C.D. 206, 66 C.B.C. 2d 753 (1977). Even if it is assumed arguendo that a District Court might have the usual Federal question jurisdiction, or diversity, or other jurisdiction, transfer is not possible by

a Bankruptcy Court that is without jurisdiction. This is more than a venue problem. Conversely, in the absence of legislative authorization, the District Courts cannot confer such jurisdiction either on the Bankruptcy Courts or any other court. Likewise, the Circuit Judicial Council cannot confer jurisdiction on the District Courts as a legislative device.

Even though the Supreme Court has apparently declared 241(a) of the 1978 Bankruptcy Reform Act (Public Law 95-598, November 6, 1978, 92 Stat. 2549 enacting 28 U.S.C. §1471) unconstitutional by the plurality opinion, if it is assumed for the sake of expediency that jurisdiction still lies in Article I Bankruptcy Courts over disputes involving parties who have constructively subjected themselves to bankruptcy court jurisdiction in causes

sounding in contract or other state statutory and common law types of disputes, such jurisdiction is not involved instanter because of the very nature of the state foreclosure suit. Hence, even the fiction of District Court jurisdiction does not provide a cause of action the District Court can resolve as a federal question or diversity case. The District Court was vested by the Bankruptcy Code with only appellate functions and then only if the litigants chose not to appeal directly to the Circuit Court of Appeal (or a possible Bankruptcy Judge Appellate Panel to be constituted by the Court of Appeals (or a possible Bankruptcy Judge Appellate Panel to be constituted by the Court of Appeals to avoid the expenses of double-step and triple-step appeals). See 28 U.S.C. Chapter 6, "Bankruptcy Courts" §§151-60, which sections further

emphasize the Supreme Court's conclusion that only the Bankruptcy Court was vested with jurisdiction under 11 U.S.C. §1471.

II.

There is a more serious aspect, however, from the exercise of fictional jurisdiction by both the Bankruptcy Courts and the District Courts. As between the litigants the judicial process, including appellate court scrutiny of decisions of trial courts, provides a crucible to rationalize the exercise of jurisdiction and the deprivation of rights by means which do not bear constitutional muster.

The Bankruptcy Judges and the District Judges should not obviate the very dire possibility of civil liability of judges themselves to the litigants. Despite the general rule that a judge is not civilly liable for acts done in the

exercise of the judicial function, the Supreme Court has consistently held that judges of courts of limited jurisdiction (as are all federal courts) are not immune from civil liability where there is no jurisdiction and the lack of jurisdiction over the subject matter is known to the judge. The Northern Pipeline decision, no matter how interpreted, puts Bankruptcy Judges and District Judges on notice that 28 U.S.C. §1471 is unconstitutional. Assuming arguendo that there may be judicial immunity, even for acts in Northern Pipeline may invoke a law suit against a Bankruptcy Judge or District Judge on the basis that there is not even colorable jurisdiction in a particular case. See 36 Am. Jur. 2d Judges §§ 72 et seq.,; "Supreme Court Views As To Civil Liability of Judges," 55 L. Ed.2d 850.

Before the decision in Northern Pipeline judicial immunity was no doubt complete protection until the jurisdiction statute was declared unconstitutional. Now this specter has been raised and litigants might well demand obeisance to the Constitution and the Supreme Court decision.** The very uncertainty of jurisdiction and of civil liability dictates the implementation of the spirit of

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**. All of the Supreme Court opinions, those of the plurality, those in dissent, and those concurring, clearly acknowledge and, in effect, emphasize that the creation of federal courts, (whether "Article I" or "Article III" Courts) is a legislative function. Whatever the deficiencies, in any view, existing in the 1978 Bankruptcy Reform Act and 28 U.S.C. §1471, found to be unconstitutional, must be remedied by the Congress as a legislative matter under Article I of the Constitution and not by the Courts under Article III. The separation of powers doctrine, so cherished in our Constitutional form of government, works both directions.

provisions of 11 U.S.C. §305 which reads, as follows:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if -
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or
>
> (2)(A) there is pending a foreign proceding; and
> (B) the factors specified in section 304(c) of this title warrant such dismissal or suspension
>
> (b) A foreign representative may seek dismissal of suspension under subsection (a)(2) of this section.
> (c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise. [emphasis added].

Weighed against the question of jurisdiction and the possibility, even if remote, of civil liability of a Bankrupt-

cy Judge or District Judge, is the fact that the state Common Pleas Courts have unquestioned general jurisdiction. The potential for interference with the purpose of the Chapter 11 Reorganization by state courts and the desirability and means of conferring federal court jurisdiction in particular bankruptcy cases are legislative matters not judicial, even though hundreds of thousands of individual debtors, business entities, creditors and other affected parties may suffer disastrous consequences.

ORDERED, ADJUDGED AND DECREED that neither the Bankruptcy Courts nor the District Courts are vested with jurisdiction over the litigation of state law causes of action involving nondebtors in a bankruptcy court unless conferred by a jurisdictional statute enacted by the Congress to supplant 28 U.S.C. §1471 or

the jurisdiction conferred upon the District Court by other statutes.

ORDERED, that the foreclosure suit filed on June 25, 1982, by the Winters National Bank and Trust Company of Dayton vs. Schear Group Inc., et al., under Case No. 82-1820, and removed to this Court on July 29, 1982, should be remanded to the Common Pleas Court of Montgomery County, Ohio for disposition, as the only court having jurisdiction.

Entered at Dayton, Ohio in said District on the 27 day of December 1982.

s/ Anderson
BANKRUPTCY JUDGE

CC: Thomas C. Scherer, Attorney for Debtor, 400 Union Federal Building, Indianapolis, Indiana 46204
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William Smith, Esq., 2100 First National Plaza, Dayton, Ohio 45402

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:

NORTHLAND POINT PARTNERS,

Debtors. Case No. 82-05387-W

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Plaintiff, Adversary No. 82-2277-W

v.

THE STOUFFER CORPORATION,

Defendant.

NORTHLAND POINT PARTNERS,

Plaintiff, Adversary No. 82-2332-W

v.

THE STOUFFER CORPORATION,

Defendant.

ORDER

ORDER

This cause is on before the court on appellant Stouffer Corporation's motion challenging the constitutionality of an Interim Rule governing the administration of the bankruptcy system adopted by the United States District Court for the Eastern District of Michigan. After a careful review of the relevant statutory and case law, we remain persuaded that this Interim Rule, adopted in response to the Supreme Court's decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 50 U.S.L.W. 4892 (June 28, 1982), is constitutional and valid.

We hold that Marathon does not create a jurisdictional lapse. The relevant statutory provisions taken singularly and conjunctively manifest

the Congressional intention that at the very least federal district courts would retain jurisdiction of matters arising under Title 11 or arising in or related to cases under Title 11 until April 1, 1984. Congress carefully kept in effect, until 1984, statutory provisions that give the federal district courts "original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy." 28 U.S.C. § 1334. Congress also made clear, through incorporation by reference, that the jurisdictional powers of the federal district courts would not change during the transitional period. §§ 404 and 405, Bankruptcy Reform Act of 1978 (P.L. 95-598). Congress purposely included these provisions to satisfy its stated concern over the constitutionality of the broad jurisdictional grant afforded

to bankruptcy judges under the act. It is apparent that Congress, at a minimum, wanted to maintain federal court jurisdiction over matters arising in bankruptcy proceedings.

Alternatively, it appears to us that the only jurisdictional grant that was deemed non-severable in Marathon was that given to the Article I bankruptcy courts. The two concurring justices noted that "This grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts." Marathon, id. at 4903. In considering the entire structure of the Bankruptcy Reform Act of 1978, it appears to us that the power conferred by 28 U.S.C. § 1471(a) and (b) was arguably not affected by the Marathon decision. We recognize, however, that Congress did not want federal district courts to

permanently exercise the jurisdictional power found in such provisions as present § 1334 of Title 28. See Marathon, id. at 4902, n. 40. The district courts are vested at least until 1984 with jurisdiction over bankruptcy matters. The rule that Stouffer now challenges was promulgated in complete accord with the inherent power of an Article III federal district court to dispose of judicial matters that come before it. This interim rule provides that the district courts may delegate many of the duties they must perform under their bankruptcy power to bankruptcy judges. The authority for this is found in § 105 of the Bankruptcy Reform Act of 1978 (11 U.S.C. § 105), which gives courts of bankruptcy the power to "issue any order, process, or judgment that is necessary or appropriate to carry out

the provisions of this title," and in Bankruptcy Rule 927, which gives bankruptcy courts the power to adopt "rules governing practice and procedure under the Act." This delegation of power is consistent with the long tradition established by Congress of a bankruptcy court consisting of two judicial officers and the clear intent of the Congress to continue a two-officer court of bankruptcy through 1984.

Accordingly, we hold that the Emergency Rule adopted by the United States District Court for the Eastern District of Michigan pursuant to a resolution of the Sixth Circuit Judicial Council is constitutional and valid. A more detailed analysis responding to all of appellant's contentions will be forthcoming in a Memorandum Opinion from this court.

NOW, THEREFORE, IT IS ORDERED, that appellant Stouffer's motion challenging the Interim Rule be and the same hereby is DISMISSED;

IT IS FURTHER ORDERED that appellant's motion for a stay of bankruptcy proceedings be and the same hereby is DENIED.

s/ Robert E. DeMascio
Robert E. DeMascio
United States District Judge

Dated: January 7, 1983

IN THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL
CIRCUIT, IN AND FOR DADE
COUNTY, FLORIDA

GENERAL JURISDICTION
DIVISION

CASE NO. 80-4680
80-11156

CHARLES SMITH and :
ROBERT WATERS,
:
Plaintiffs,
:
vs.
:
JOHNS MANVILLE SALES
CORP., etc., et al.,:
Defendants. :
:

Transcript of proceedings had in the above-entitled cause, before the Honorable MOIE TENDRICH, Circuit Court Judge, at the Dade County Courthouse, Miami, Florida, on January 17, 1982, commencing at or about 1:00 o'clock p.m.

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APPEARANCES:

GILREATH & ROWLAND
BY: FRANCES LEE ANSLEY, ESQ.
on behalf of the Plaintiffs

DIXON, DIXON, HURST & NICKLAUS
BY: M. STEPHEN SMITH, III, ESQ.
on behalf of Armstrong Cork Co.

KIMBRELL, HAMANN, JENNINGS, WOMACK, CARLSON & KNISKERN, P.A.
BY: CAROL A. FENELLO, ESQ.
on behalf of Eagle Picher, Inc.

SHACKLEFORD, FARRIOR, STALLLINGS & EVANS
BY: CLARK JORDAN-HOLMES, ESQ.
and HOWARD ACOSTA, ESQ.
on behalf of Celetex

LEE, SCHULTE, MURPHY & COLE, P.A.
BY: JACK M. COE, ESQ.
on behalf of King Corp.

(Whereupon, the following proceedings were had:)

THE COURT: What are we on today?

MS. ANSLEY: The question today is whether these cases should be stayed because of the bankruptcy matter.

THE COURT: All right. Has there been any decision since we last met? I read in the paper about some -- what is the status of the bankruptcy case?

MS. AYNSLEY: There have been quite a few.

MR. ACOSTA: On Tuesday there was rendered a 70 page order in the bankruptcy matter.

MS. ANSLEY: Which I have a copy of here.

MR. ACOSTA: I got my copy on Friday around noon and I haven't really had time to thoroughly review it.

THE COURT: What is the bottom line?

MR. ACOSTA: Well, the bottom line is that he thinks that the state courts should make their determination on the case by case basis as to whether Johns Manville should be made a part of the lawsuit or severed out.

MS. ANSLEY: The bottom line is the automatic stay provisions do not apply.

MR. ACOSTA: Well, he said he would not apply the automatic stay to all the co-defendants nationwide. He thought that was too large a task and that it should be done on a case by case basis.

Since Judge Liflin (phonetic) said he would rule, something else has happened that we would like to argue. And that is that on December 24th the Supreme Court stay of the Marathon Oil case was lifted. And that case held much of the bankruptcy code unconstitutional. And specifically, claims which are not ordi-

narily those which a bankruptcy judge would hear and that an article three judge would hear were those which were unconstitutional as you have in the state court, state tort claims like we have here. And I know that Mike Roland, on behalf of the plaintiffs in Tennessee, filed an extensive brief with one of the federal courts in Tennessee and asked the judge up there to go forward against Johns Manville.

What we would like to do, I am prepared to argue that the bankruptcy code is unconstitutinnal, that Judge Liflin doesn't have the power to entertain the claims of Mr. Waters and Mr. Smith in the two cases before your Honor, and that you do have the power to order the cases forward against Johns Manville.

In the alternative, we would ask this Court to do what Judge Carr in Tampa

did on Friday. And that is modify the stay for another two months and proceed on some of the issues which don't involve Johns Manville.

Judge Carr does not want to try the cases twice, as I am sure your Honor does not want to try them twice. He wants to avoid piecemeal litigation and any possible inconsistent verdict. So he said that we could go forward in the Tampa federal cases, I think, and hear motions for summary judgment, jurisdictional motions, the types of things that Johns Manville is not involved in.

Many of the plaintiffs up there had filed motions for summary judgment on the basis of no product I.D. or for other reasons. But we are going forward as to those issues. But the cases remain stayed otherwise for another two months. And

he is going to look at it again and see what is going on in the bankruptcy court.

So we have two alternatives. Either a stay for another two months or we would like to go forward against Johns Manville. I don't know whether Ms. Ansley's position in regard to going forward would be different than they took in Tennessee, but that is what we would like to see go because we don't see any reason why it shouldn't go forward with them in it.

THE COURT: Who do you represent?

MR. ACOSTA: We represent Celetex.

MR. HOLMES: Judge Liflin said that no discovery could be commenced until after March 31st.

THE COURT: Why?

MR. ACOSTA: He rule --

THE COURT: I don't understand. He either lifted the stay or he didn't.

MS. ANSLEY: Your Honor, he was asked to make a ruling as to whether the stay -- he was asked by Celetex and several other of the co-defendants in these actions to either rule that Johns Manville should be brought into the litigation, which I think all of us would like to see happen. We would certainly prefer to bring thee cases with Johns Manville in them or to rule that the stay applied to all co-defendants.

Judge Liflin, in this order, said that the stay does not apply to anyone but the debtor himself. And for that reason it is a little inaccurate to describe Judge Carr's ruling as one that the stay is still in effect.

As I understand the ruling, he says it is clear that the stay does not apply. And he cannot indefinitely stay the action. But that because Johns Manville,

because of the situation in New York, is still undefined, he is exercising his discretion to proceed with discovery in phases and deal with that discovery that won't get them mixed up with J.M. in any case.

First, Judge Vann on the other hand had simply severed Johns Manville from the other cases.

THE COURT: I don't intend to do that. I intend really, unless some higher court says that Johns Manville cannot be sued, say go ahead and let's set this case for trial.

MS. ANSLEY: With Johns Manville in the case?

THE COURT: Yes, Ma'am.

MR. ACOSTA: All right. Then I think that is terrific.

THE COURT: And everybody grab your best hold and tell me when you want it

set for trail and we will have us some pretrial and all of that and motions to dismiss. I would like to do that in one day and move it along.

MS. ANSLEY: Very good.

THE COURT: I mean, now that the bankruptcy judge has ruled, and from what you tell me he has really said that there is no stay as to Johns Manville.

MR. ACOSTA: No, your honor.

THE COURT: What did he say?

MS. ANSLEY: He has ruled that the stay does apply to Johns Manville, the debtor who has invoked the protection of Chapter 11.

THE COURT: Then how can we proceed with Johns Manville?

MS. ANSLEY: Well, because of the Marathon Pipeline case there is a void in the bankruptcy law.

THE COURT: Well, somebody better tell me what this bankruptcy judge said. Did he lift the stay as to Johns Manville or not?

MS. ANSLEY: No.

THE COURT: Then where are we going to?

MR. ACOSTA: In fact, he extended the stay as to Johns Manville employees and won't permit anybody to even take discovery of them so they can better prepare their plan of reorganization.

But as I was trying to tell the Court at the Marathon Oil case, which was a United States Supreme Court case, and last June gave Congress until December to fix the act and they didn't do that. So it is our position that under the act Judge Liflin has no power or authority over state tort claims like this. And so if we got an order from this Court to go

forward against Johns Manville, Johns Manville would have to seek an injunction from Judge Liflin.

THE COURT: Who represents Johns Manville?

MR. ACOSTA: George Bender. And they are not here.

MR. COE: They have stayed out of these proceedings since --

MR. ACOSTA: They are not being paid anymore.

MR. HOLMES: And I am sure their position would be that the bankruptcy act is still constitutional despite what the Supreme Court said.

MS. ANSLEY: Your Honor, we did file a brief in Federal Court in Tennessee recently, maybe within the past two weeks, seeking the Court's order to bring Johns Manville back into our cases based

on the fact that the bankruptcy law has been declared unconstitutional.

Judge Winter, who is a judge from Colorado who is sitting to here these cases in Tennessee right now ruled that in his view the bankruptcy action was not that void anyway and that we would proceed to trial against the other co-defendants. He severed Johns Manville and we are proceeding against the remaining co-defendants.

We would be happy to submit our arguments in writing that you should in fact bring them back in.

THE COURT: Does it make sense to try it without Johns Manville in it?

MS. ANSLEY: No. It is unjust to the plaintiff. It is unjust to the other co-defendants.

THE COURT: How can we get it to an appellate court to rule on whether or not

Johns Manville ought to be in the suits or not?

MS. ANSLEY: If you rule that we should go forward against Johns Manville the bankruptcy court right now has no injunctive power. They would have to go to the Southern District of New York to enjoin us against going forward. And we could take that up to the federal appellate court and have the determination made as to whether the bankruptcy code is in force for these state tort claims or not.

THE COURT: As far as I am concerned, that is the way I want to do it.

MS. ANSLEY: If you are willing to do it, your Honor, we would love to have it. Other motions, we can certainly go against the other co-defendants if they are not in this case. We have joint and several liability.

THE COURT: But is it fair to them? That is what I don't understand. Something bothers me.

MS. ANSLEY: It is our position that the entire Chapter 11 bankruptcy filing was unfair. And we are attempting to get them out of those proceedings.

MR. ACOSTA: We take the same position on that. We just don't think -- it would create so much further litigation litigation that we would have two lawsuits. We would have 14 contribution claims filed up in the Southern District for every case. it is just going to create an unbelievable mess if we go forward without Johns Manville who, incidentally --

THE COURT: Does someone want to attempt to write an opinion for me that would make sense that would say, basically, that in view of the fact that the

bankruptcy act has been declared unconstitutional and they have no injunctive powers -- is that what you are saying?

MR. ACOSTA: They enacted an emergency rule. And in that rule it states that the bankruptcy judge does not have any injunctive power.

THE COURT: Rather than make my ruling, why doesn't somebody take it up on prohibition? I don't understand this playing around with jurisdiction, because an original action in prohibition would cure it, wouldn't it? Isn't that a quick way to get a resolution?

MR. ACOSTA: That may be. I don't know.

MS. FENELLO: To prohibit whom?

THE COURT: Everybody. Either the bankruptcy court from enjoining it or to prohibit me from proceeding or to prohibit something. I mean, I have never seen

a mess like that. And everybody just seems to be sitting back waiting. Plaintiff ought to have his day in court and the defendants ought to have their day in court. And I don't understand it.

MR. ACOSTA: Judge, for all we know there may be a prohibition proceeding being contemplated up there right now.

THE COURT: Has anyone tested this order?

MR. ACOSTA: No. That is not even a signed order. It just came out.

THE COURT: And what does the bankruptcy judge there say? He says that you can go against whoever you want to except Johns Manville?

MS. ANSLEY: That is right.

MR. COE: And under Marathon Pipeline, which has been in effect since -- the question is whether he has jurisdiction at all.

THE COURT: I am not about to rule on that, my friend. They have a whole bunch of other courts to rule on that.

MS. ANSLEY: Then, your Honor, we would like to ask you to sever Johns Manville from these cases.

THE COURT: That doesn't make any sense to me.

MS. ANSLEY: It makes more sense than the plaintiff who, in Mr. Waters' case, for instance, is quite ill, having to wait for a resolution of the bankruptcy proceeding before we can --

THE COURT: Are you going to take it up if I sever? Why don't you take it up?

MR. COE: How are you going to appeal that? It is an interlocutory order, but not one of the enumerated areas for interlocutory appeal. And the only other way to take it up would be petition for common law cert.

MS. ANSLEY: We had a trial date in Miami before Judge Vann on February 21st, your Honor. And these proceedings are --

MR. HOLMES: Judge Vann has not addressed those questions.

MR. COE: The order is all prior to Marathon and the latest bankruptcy court order.

MS. ANSLEY: Nevertheless, he has proceeded to have a hearing and proceeded along with the trial dates despite the fact that the order did come down.

MR. ACOSTA: Judge, I think that for one thing this particular order suggests that, on a case by case basis --

MS. ANSLEY: You are referring to the Liflin order?

MR. ACOSTA: Yes. The judge suggests that if Johns Manville, in any given case, was responsible for most of the exposure of the plaintiff, and I

think most of us bought our fiber from Johns Manville, that it would be unfair to proceed without Johns Manville and that ought to be determined by each and every state court. Secondly, I think that a good compromise to going forward, which would get a lot of procedural things out of the way which has to be done anyway, would be to continue, make a temporary stay but not set the case for trial until this has been resolved, but perhaps hear some of the issues that don't involve Johns Manville.

Some of the defendants are going to have things that they can bring before the Court that won't have any bearing on Johns Manville's role in the case. And the Court might be able to listen to those things, just like Judge Carr is going on, and revisit the question of whether we should proceed with J.M. in

the case or the case should be stayed two months from now.

THE COURT: You say Judge Vann has severed it?

MR. ACOSTA: A long time ago.

MR. COE: I think November, Judge. This is before the stay was lifted and Marathon Pipeline.

THE COURT: And nobody attempted to stop Judge Vann from proceeding in that manner?

MR. HOLMES: We have a hearing before Judge Vann.

THE COURT: For what?

MR. HOLMES: Pretrial.

MR. ACOSTA: We are intending to mention to Judge Vann the unconstitutionality of the act. That has not been done yet. He has not heard that issue yet. And this is a part of the rule that I mentioned, your Honor. And it states

that the bankruptcy judge does not have the power to enjoin a court.

So what they would do is probably try to get the district court to do that if your Honor ordered that we go forward against Johns Manville. But that is the quickest way I know to try and get a determination made as to whether this rule and the act are unconstitutional, and that we can get J.M. back in all of these cases nationwide.

MR. HOLMES: Your Honor, the reason the Marathon Pipe case held the bankruptcy act to be unconstitutional was because the bankruptcy judges were given authority that only trial judges should have. And we are dealing with exactly one of those powers; whether the bankruptcy judge, who is not a judge appointed for life, has the authority to tell the Federal District Court judge or a state

court trial judge, "You cannot go forward against this bankrupt."

THE COURT: All right. I will go ahead and rule that way. I am not going to set it for trail, though, until discovery is completed and we have had an opportunity to pretry it in its entirety. But I think justice cries out on behalf of everybody that everybody be in it.

If this act says what you say it says, I would like to read that opinion. From what I read in the paper, that is exactly what they said; that because these bankruptcy courts were not created, well, they are not federal district judges, and they have no injunctive powers. And I am going to go ahead and order that Johns Manville be proceeded against.

I don't know if they will have me up in front of anybody, but I just think it is unfair to everybody. I really do.

MR. HOLMES: I think everybody agrees with that, your Honor.

THE COURT: And if this is the case, then let it go.

Now, who will stop it? I guess that is an appealable order. I don't know. Is this an appealable order?

MR. COE: The only thing Johns Manville can do is go back to the district court and get it to --

THE COURT: I don't think I am in contempt of anybody, do you?

MR. COE: Well, who?

THE COURT: The bankruptcy court. I don't know.

MR. ACOSTA: I don't think so. If we consider the act unconstitutional --

MS. ANSLEY: We are not bankruptcy lawyers yet, your Honor.

MR. COE: I think you would have immunity.

THE COURT: I think somebody ought to rule on the jurisdiction. And this might be the quickest way to do it. I don't know. I really don't.

MR. HOLMES: A similar thing happened in the first district, your Honor, where Johns Manville had a case on appeal and they got an injunctive order against the third D.C.A. and then went to the bankruptcy court and then dropped it. They withdrew their appeal or request.

THE COURT: Well, the only thing though that prohibited anybody form proceeding against Johns Manville was the bankruptcy court order. And this bankruptcy judge now is familiar with the

U.S. Supreme Court case. Or did his order come out before it?

MR. ACOSTA: His order came out after it. And he refers to -- he treats it very lightly. he referred to this rule which was adopted by the district courts to, in effect, what they say is to cure the code defect, the constitutional defect, by allowing the district judge to more or less rubberstamp what the bankruptcy judge does.

THE COURT: Has there been a federal district court judge that has, in effect, granted a stay?

Now, when I practiced law it used to be that the federal district judges entered the injunctions. When did the bankruptcy referrees, when did these judges, start entering injunctions?

MS. ANSLEY: I think that as to Johns Manville it is Judge Liflin in the

Southern District of New York and his application of the stay. It is an automatic stay.

MR. COE: Under the act as amended, I think it is 77, Judge.

MR. ACOSTA: That is the emergency rule. That one has been adopted by the Southern District. I think it has been adopted by all the districts so that they won't have too many any problems with all the bankruptcies that are filed all around the country. They wanted to keep it going and that is one reason why I think a state court might be better able than the federal court, because I don't think we will find a federal judge to go along with us.

They can see a lot of chaos in having the bankruptcies in this particular district --

THE COURT: This rule says that a bankruptcy judge cannot enjoin the court.

MR. ACOSTA: That is right, Judge.

MR. HOLMES: Isn't that order signed by the bankruptcy court?

MS. ANSLEY: It is an order of the bankruptcy judge. It is Liflin's order. I think you are right. I don't see a signature on it.

THE COURT: Well, under this rule, the bankruptcy judge still cannot enter the injunction. Is that correct?

MR. ACOSTA: That is the way I understand it. So if the district judge did that, then --

THE COURT: I tell you what I would like to do. I would like to enter the order and I indicated. Have it effective, say, 60 days to give the federal district court in New York an opportunity to review it.

MR. ACOSTA: And we can serve it on J.M's local counsel?

THE COURT: Exactly right.

MS. ANSLEY: And shall we set a hearing date 60 days from now to see what has happened in the meantime and what we should do?

THE COURT: I would think so. But it just seems to me -- no. Then go ahead with your discovery. And if somebody comes in for a protective order, I think that might bring it to a head. It seems like it could certainly be reviewed in 60 days by whoever. And whoever prepares it, if you prepare it and refer to that federal case, refer to this rule. And if that is the only injunction that exists, it seems to me we ought to go ahead and proceed unless we are prohibited by the district court that has jurisdiction.

MR. ACOSTA: Fran, I think you all hired a bankruptcy expert to write your brief. Maybe he could help us with the order.

MR. HOLMES: We could get together.

THE COURT: It looks like everybody wants Johns Manville in.

MS. ANSLEY: Certainly. But if we can't --

THE COURT: I understand that. And I told you, if we are going to proceed without a defendant, somebody is going to have to stop me, but something I picked up recently where the jury will say a percentage is to who and that kind of stuff, which I don't think anybody wants.

But I just wouldn't feel right on it otherwise. And I don't know.

All right. Who is going to undertake to draw the order?

MR. ACOSTA: Maybe we could get together on it and submit it to your Honor.

THE COURT: I would think that Johns Manville could go before the United States District Court here as far as that goes to review this order. I don't know if they want to. Or they can go to New York or wherever they are.

This is the rule that has been adopted by all or just --

MR. ACOSTA: It is my understanding that it was a rule that was proposed at a federal judges' conference.

THE COURT: Well, do any of you know? What I am really saying is, are you telling me now that under the decision in that pipeline case, as well as this rule, a bankruptcy judge does not have the power to enjoin a court?

MR. ACOSTA: Yes, sir. That is what my understanding is.

MR. COE: And that is the purpose under the Marathon Pipeline case. That is why the various U.S. District Court judges have adopted that rule to have some kind of uniformity.

THE COURT: Well, under this rule have the district courts been entering any injunctions?

MR. ACOSTA: It has been so recent, Judge, that I don't know. That is the problem. It has really just come up. The stay ran on the 24th of December.

THE COURT: I think maybe this is the time and this is the place. And give me an order and I will sign it and we will see what happens.

MR. HOLMES: I understand that the same question has been asked in the Braniff Airlines bankruptcy. But I do not

know how far it has gone or what the case is.

THE COURT: Can I have a copy of that order?

MS. ANSLEY: This is the Liflin order denying the stay against co-defendants.

THE COURT: Yes.

MS. ANSLEY: Yes.

THE COURT: Can I keep this? Do you have an extra one of these?

MR. ACOSTA: I can get an extra copy, Judge. Go ahead and keep that one.

MS. ANSLEY: This will go in the court file.

THE COURT: Yes. This is decision one and two.

All right. I have announced my ruling, but I really still want to study both of these matters you have submitted. I am not questioning what you say.

MR. ACOSTA: Let me leave a copy of the Marathon case, Judge. That might help too.

THE COURT: All right. you want thee filed in the court file?

MS. ANSLEY: You can file these in the Waters file. Then I will go back to my office and send the Court two copies for the Smith file. Actually two cases were noted for today.

THE COURT: Do you need this in the file? I will keep it all together.

MS. ANSLEY: We might in the future.

THE COURT: I will keep this all together and file it.

Is there anything else?

MR. ACOSTA: Here is a case that supports my argument that I made too. It is out of a bankruptcy court and it is a dicta that I have underlined here sug-

gesting that this is not the type of claim should be before a bankruptcy judge.

THE COURT: All right. Does somebody want to undertake to draw the order?

MS. ANSLEY: I think the plaintiff and the attorneys for Celetex will get together.

THE COURT: And I would like the order to refer to the fact that because of the jurisdiction problems and the fact that the courts really have had no guidance, that I am entering this order with the specific purpose of giving the higher court an opportunity to --

MS. ANSLEY: And it will be limited to the 60 days?

THE COURT: I think so. In other words, unless I am prohibited within 60 days or enjoined or given some direction,

this case is going to go ahead against them.

MR. HOLMES: So you are entering the order which will take effect in 60 days?

THE COURT: Exactly right. yes.

MS. ANSLEY: But in the interim period, you are saying that we can proceed with discovery?

THE COURT: No, I am not.

MS. ANSLEY: All right. I understand.

THE COURT: Nobody does anything. I am entering the order effective 60 days, and I am giving an automatic supersedeas without bond. That is what I am saying.

MR. ACOSTA: All right.

MR. COE: All parties stayed for 60 days?

THE COURT: Yes.

(Thereupon, the proceedings were concluded at 1:30 p.m.)

CERTIFICATE

STATE OF FLORIDA)
SS.
COUNTY OF DADE)

I, JERALD GOLDFARB, Court Reporter and Notary Public, do hereby certify that I was authorized to report the transcript of proceedings before the Honorable MOIE TENDRICH, Circuit Court Judge, on January 17, 1983, and that the foregoing pages, numbered 1 through 26, represents a true and accurate record of my shorthand notes taken at that time.

DATED at Miami, Florida, this 19 day of January, 1983.

s/ Jerald Goldfarb